Public Prosecutor v Dato' Sri Mohd Najib bin Hj Abd Razak

HIGH COURT (KUALA LUMPUR) — CRIMINAL TRIAL NOS WA-45–2–07 OF 2018, WA-45–3–07 OF 2018 AND WA-45–5–08 OF 2018
MOHD NAZLAN J
21 AUGUST 2020

Criminal Law — Corruption — Officer of public body using office or position for gratification — Whether prosecution had proven s 23(1) offence against accused as Prime Minister ('PM') and Finance Minister ('FM') of Malaysia beyond reasonable doubt — Whether accused used position as PM and FM for gratification of RM42m for himself by participating in Cabinet meetings to approve government guarantees to secure RM4 billion loan to company in which he had personal interest — Whether accused had absolute control of company and used it solely for personal gain — Whether approval of government guarantees gave accused access to millions in funds which he could use as and when desired — Malaysian Anti-Corruption Commission Act 2009 s 23(1)

Criminal Law — Criminal breach of trust — Whether accused as Prime Minister and Finance Minister of Malaysia and 'Advisor Emeritus' of company was entrusted with dominion over RM42m belonging to company in which he had personal interest — Whether accused committed criminal breach of trust ('CBT') over the RM42m by dishonestly misappropriating and converting same to own use — Whether manner in which accused acted in company made him a 'director' (and thereby an 'agent') of the company under s 402A of the Penal Code — Whether accused's overarching control in company and over its board of directors also made him a 'shadow director' — Whether 'director' described in s 402A of the Penal Code included a shadow director — Penal Code s 409

Criminal Law — Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLATFPUAA') — Whether charges under s 4 of the AMLATFPUAA of money-laundering RM42m had been proven against accused beyond reasonable doubt — Whether accused had committed predicate offences (of abuse of position and CBT of company funds) on which AMLATFPUAA charges were based — Whether RM42m which entered accused's personal accounts was 'proceeds of unlawful activity' — Whether accused's failure to inquire into source and legitimacy of the RM42m amounted to 'willful blindness' under s 4(2)(b) of the AMLATFPUAA — Whether law treated willful blindness as knowledge on part of accused that funds were not legitimate

Criminal Procedure — Stay of execution pending appeal — Appeal to Court of Appeal — Whether special circumstances had been shown for sentence of jail and fine to be stayed pending appeal — Whether mitigation and sentencing could not be postponed after conviction was entered against accused — Whether serious nature of crimes committed by accused while holding high public offices warranted imposition of custodial sentences of not less than 10 years — Criminal Procedure Code s 311 — Courts of Judicature Act 1964 s 57

At all material times to this action the accused ('Najib') was the Prime Minister ('PM') and Finance Minister ('FM') of Malaysia. In his capacity as FM, he was also the Minister of Finance Incorporated ('MOF Inc') which, inter alia, wholly owned all MOF Inc companies on behalf of the Government of Malaysia. On 7 January 2011, a private limited company named SRC International Sdn Bhd ('SRC') was incorporated to invest in projects associated with the exploration, extraction, processing and trading of conventional and renewable energy resources, natural resources and minerals. Shortly after SRC's incorporation, changes were made to the company's articles which gave Najib as PM absolute power to appoint and remove members of SRC's board of directors and made him the company's 'Advisor Emeritus' whose approval was required on all major matters affecting the company. Within a year of its formation, SRC became wholly-owned by MOF Inc, thereby making Najib, as MOF Inc, its sole shareholder. One of SRC's earliest directors was Nik Faisal Ariff Kamil ('Nik Faisal') who went on to become its chief executive officer ('CEO') and the link person between Najib and SRC's board of directors. He was also empowered by Najib to operate his personal accounts in Am-Islamic Bank Bhd/Ambank (mainly to move funds between accounts). Nik Faisal and another SRC director (PW42) were the authorised signatories for SRC's accounts and also for the accounts of SRC's subsidiary company, GMSB. On 3 June 2011, SRC in a letter signed by Nik Faisal addressed to Najib in his capacity as PM and FM stated that SRC required a RM3.95 billion loan to pursue its objectives and suggested that the loan could come from Kumpulan Wang Persaraan (Diperbadankan) ('KWAP'). Najib made a note on the letter agreeing with the proposal and had the letter sent to the CEO of KWAP ('PW38'). Unconventionally, the letter was hand-delivered by Najib's principal private secretary in the PM's office ('Datuk Azlin') to PW38 in a hotel in Kuala Lumpur after office hours. KWAP was a statutory agency under the Finance Ministry and the chairman of its board was the Secretary-General of the Finance Ministry, who reported directly to the PM. The board's chairman at the material time (PW45) also headed KWAP's Investment Panel ('IP') which had sole authority to, inter alia, approve loans. The IP considered SRC's application and tentatively decided to approve a loan of only RM1 billion since it was extremely high risk to grant RM3.95 billion to a company which had no track record whatsoever. After PW45 and PW38 met Najib to inform him of the IP's decision, Najib told PW45 to expedite the loan application suggesting that 'RM2 billion would suffice'. This 'request' was conveyed back to the IP

whose members again deliberated and subsequently approved the loan for RM2 billion to SRC but subject to its repayment being guaranteed by the Government of Malaysia. On 17 August 2011, Najib chaired a Cabinet meeting to approve the giving of the government guarantee for the RM2 billion. Twelve days later, on 29 August 2011, on the strength of the government guarantee, the RM2 billion was released by KWAP to SRC in four equal tranches. Seven months later, on 13 March 2012, SRC applied to KWAP for an additional loan of RM2 billion on the same terms and conditions as the first loan. Strangely, one month before that application was made, not only had a Cabinet meeting chaired by Najib (on 8 February 2012) already approved a second government guarantee for the additional RM2 billion loan that SRC intended to ask for, but Najib, as MOF Inc, had also issued a shareholder direction to the board of directors of SRC requiring them to pass a circular resolution to apply for the second loan. The IP once again met and approved the second RM2 billion loan but its decision to release it to SRC in tranches was 'overruled' in favour of a single lump-sum payment after Najib met with PW45, PW38 and a deputy head of the Treasury regarding the matter. In addition, Najib requested PW45 to immediately release the second RM2 billion to SRC even before the formal government guarantee for it was furnished to KWAP. Although such a practice was unprecedented, it was nevertheless complied with for the reason that SRC required funds urgently for investment purposes. The second RM2 billion was released to SRC on 28 March 2012 in a single payment and the government guarantee that was subsequently issued for it was back-dated to a day before the drawdown was made. On 24 December 2014, Am-Islamic Bank received emailed instructions from Nik Faisal and PW42 to transfer RM40m from SRC to GMSB's account in the same bank and then, on the same day, to transfer the said RM40m from GMSB to the Affin Bank account of another company, IPSB. Two days later, ie on 26 December 2014, from the RM40m that IPSB had received, RM27m and RM5m were respectively transferred to Najib's confidential bank accounts (Nos 880 and 906) in Am-Islamic Bank. Those transfers were authorised by IPSB's managing director, PW37, who said that at the time the transfers were done, he neither knew their purpose nor to whom the funds were going to because of the secrecy code on the accounts. PW37 was merely instructed to make the transfers by PW49, who was the CEO of Yayasan Rakyat 1 Malaysia ('YR1M') who, in turn, had received instructions to that effect from Datuk Azlin (Najib's principal private secretary). PW37 said he was obliged to carry out the instructions because YR1M funded IPSB's operations. Also, Najib was the chairman of YR1M's board of trustees on which Datuk Azlin also sat. On 5 and 6 February 2015, Nik Faisal and PW42 instructed Am-Islamic Bank to transfer another RM10m from SRC to GMSB and from there to IPSB from where, on 10 February 2015, PW37 authorised the RM10m to be transferred into Najib's Account 880 (the sum was subsequently transferred to Account 906). Meanwhile, pursuant to Najib's written instruction (exh P277), Am-Islamic Bank on 29 December 2014 transferred the RM27m in Account

880 and the RM5m in Account 906 to, respectively, two companies — PBSB and PPC — who, as it turned out, had in July and September of 2014 loaned Najib the exact same amounts to regularise his personal accounts which were either short of funds or overdrawn due to overspending. And as for the RM10m that came into his Account 906, Najib issued a series of cheques in early 2015 that depleted that entire sum within days through payments out to various individuals and organisations, mainly for political purposes. Sometime in 2015, when it became obvious that SRC could not pay the interest due on the KWAP loans — which threatened to trigger an event of default that would have caused KWAP to call for immediate repayment of the loan sums with interest under the government guarantees — the Finance Ministry decided to approve three short-term loans (totaling RM650m) to SRC over three years to enable it to pay the interest due to KWAP. Two of those loans, amounting to RM550m, from the Consolidated Fund, were sanctioned by Najib himself. Following his fall from power after the 14th General Election, which saw a change in government, investigations by the Malaysian Anti-Corruption Commission (MACC) into various alleged wrong-doings by Najib led to the instant seven charges being filed against him in the High Court: (a) a single charge under s 23 of the MACC Act 2009 which said that on 17 August 2011 and 8 February 2012, Najib had used his position as PM and FM for gratification of RM42m to himself by his involvement in the decision of the Government of Malaysia to guarantee KWAP's RM4 billion financing to SRC ('the MACC charge'); (b) three charges under s 409 of the Penal Code which said that between 24 December 2014 and 29 December 2014 and again between 10 February 2015 and 2 March 2015, Najib had as an agent, ie, as PM, FM and Advisor Emeritus of SRC, and in those capacities entrusted with dominion over RM42m belonging to SRC, committed criminal breach of trust of the said sum ('the CBT charges'); and (c) three money-laundering charges under s 4(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 which said that on 26 December 2014 and 10 February 2015 Najib had received in his Account Nos 880 and 906 at Am-Islamic Bank Bhd a total of RM42m which was proceeds of unlawful activity ('the AMLATFPUAA charges'). All the charges were jointly tried. The prosecution's case was that Najib had caused the RM42m belonging to SRC to be transferred into his personal accounts through GMSB and IPSB (to avoid detection) by abusing his positions of authority both in SRC and in government and had personally benefitted from the use of those funds. A significant bulk of the RM4 billion that KWAP had loaned SRC was almost immediately transferred to accounts outside the country and the exact status of those funds was not immediately known. At the end of the prosecution's case, the trial court found that a prima facie case had been made out and called on Najib to make his defence to all the charges. Inter alia, the key contentions of the defence were that: (i) Najib never knew that monies from SRC went into his personal accounts since he had left the management of his accounts to Datuk Azlin, Nik Faisal and another individual named Jho Low and it was their

responsibility to ensure that he had sufficient funds in his accounts at all times for cheques to be issued; (ii) Najib believed at all material times that the funds that came into his accounts from 2011–2013, and once again in 2014, were donations from King Abdullah of Saudi Arabia. This belief was wholly based on representations made to Najib by Jho Low who was close to the Saudi royal family and who had even set up a meeting for Najib to meet King Abdullah in Riyadh; (iii) Najib had no personal interest in SRC and his involvement in the Cabinet meetings to approve the government guarantees was bona fide and necessary to advance SRC's interests as a MOF Inc company; (iv) there was no corrupt nexus between Najib's participation in the Cabinet meetings to approve the government guarantees and the RM42m that went from SRC into his personal accounts; (v) Najib never personally authorised the transfer of the RM42m out of SRC and it must have been carried out by third parties for their own ulterior purpose and benefit without Najib's knowledge; (vi) the prosecution had not established that the RM42m in the CBT charges belonged to SRC or whether that sum was part of KWAP's RM4 billion financing to SRC; (vii) SRC's board of directors, and not Najib, was at all times exclusively entrusted with dominion over the company's funds and affairs; (viii) the prosecution had not proven the ingredients of 'dishonesty' and 'misappropriation' in the CBT charges or that the RM42m was 'proceeds of unlawful activity' in the AMLATFPUAA charges; and (ix) since the prosecution had not proven that Najib had committed the predicate offences (ie, the MACC and the CBT charges) on which the money-laundering charges were based, the AMLATFPUAA charges could not be sustained.

Held, convicting Najib on all the seven charges and sentencing him to 12 years' jail and a fine of RM210m (in default five years' jail) on the MACC charge and ten years' jail on each of the three CBT charges and each of the three money-laundering charges under the AMLATFPUAA; ordering the custodial sentences to run concurrently and granting a stay of execution of the sentences (both of jail and fine) pending appeal:

The MACC charge:

(1) Because of his position as PM and FM, Najib was able to endorse the establishment of SRC which he then used for his own private advantage. Importantly, he managed to secure for SRC the RM4 billion financing from KWAP and the government guarantees for the entire financing, all made possible by his overarching authority in SRC — as PM with the power (under SRC's articles) to appoint and dismiss its directors, as Advisor Emeritus to whom all matters of importance affecting the company had to be referred, and, later, as sole shareholder of SRC as MOF Inc. Najib's interest in SRC was not one that was entirely professional in the public office context but showed the existence of a private and personal interest which was caught by s 23 of the MACC Act 2009 (see paras 136, 139–140 & 1454).

(2) Both the CEO of KWAP (PW38) and the chairman of its board and investment panel ('IP') (PW45) were appointed to their positions in KWAP by virtue of the exercise of the authority of the FM. And PW45, as Secretary-General of the Finance Ministry, reported directly to Najib as FM. Thus, at all material times, Najib held a position of superiority over those to whom he had made his 'requests' and therefore had a considerable degree of influence (acknowledged by PW38 in her testimony) over the decisions they made as they were, for all intents and purposes, his subordinates. Najib's dealings with his 'subordinates' in the instant case were outside the remit of due process and his 'requests' were, understandably, taken to be instructions. Examples of Najib's influence were: when PW45 and PW38 felt obliged to report to Najib on the IP's initial decision to approve only RM1 billion to SRC; the IP's subsequent decision to revise the amount to RM2 billion in line with Najib's request; the IP's approval of the second financing of RM2 billion to SRC after being told that the FM had advised that the additional financing should come from KWAP as the government had already approved a second guarantee for it; and the 'instruction' that KWAP should not only release the second financing in one lump sum (contrary to its initial decision to release it in tranches) but release it even before the formal government guarantee for it had been issued (see paras 1305, 1307–1329 & 1380–1387).

(3) Najib's overall conduct and involvement, founded on his overarching control of SRC, was beyond the ordinary and outside the remit of usual conduct or involvement expected of a PM or FM similarly circumstanced. His mere presence at the Cabinet meetings that approved the government guarantees was sufficient to constitute the offence under s 23(1) of the MACC Act whereby the mens rea for the offence was established when, knowing of the conflict between his public duty and his private interest but motivated by his intention to obtain the gratification, Najib failed to declare his interest in SRC at the Cabinet meetings and failed to withdraw from the meetings. Najib's participation in the approval of the government guarantees caused KWAP's funds to be released to SRC thereby putting Najib (who had full control of SRC) in a position where he had access to those funds which he could use as and when he desired. This advantage that he obtained was the gratification and actus reus of the offence. The prosecution had thus proven the element of 'use of position for gratification' in s 23(1) beyond reasonable doubt. On the entirety of the evidence, the defence failed to raise a reasonable doubt in the prosecution's case under s 23(1), much less succeeded in rebutting, on balance of probabilities, the statutory presumption under s 23(2) of the MACC Act (see paras 1453, 1456, 1470, 1475–1478 & 1536).

(4) Section 23(4) of the MACC Act had no application in the instant case because Najib's involvement in the approval of the government guarantees was not for the advancement of national interest or for the interest and advantage of the Government of Malaysia. And, after the monies were drawn down into the accounts of SRC, none of the shareholder minutes Najib issued as sole shareholder of SRC (as MOF Inc) as to utilisation of those funds were in line with the justifications and recommendations outlined in the Cabinet papers, ie, the objectives for which SRC was established. At the same time, it again showed Najib's actions in micro-managing the affairs of SRC to the extent of directing how the financing from KWAP was to be disbursed (see paras 1496 & 1498).

(5) The prosecution was not required to prove that the RM42m that found its way into Najib's accounts was part of the RM4 billion financing granted by KWAP to SRC. There was no dispute from the evidence, including the money trail that the RM42m did come from SRC's accounts. As long as it was shown that Najib intended to obtain monies belonging to SRC as a result of the decision he made when there was a conflict of interest, the offence was complete. There was no necessity to prove that the exact monies that went into his personal accounts were part of the RM4 billion from KWAP. The proof required was that the funds in question were SRC's property. How those funds came to be part of SRC's property was irrelevant. The charge did not specify any nexus between the RM42m and the RM4 billion. In any event, Najib admitted during his testimony that most of the funds in SRC were from the KWAP loans (see paras 1508–1510).

The CBT charges:

(6) On the totality of the evidence, the prosecution had established beyond reasonable doubt that Najib was a director of SRC (as defined under s 402A of the Penal Code) and while entrusted with dominion over SRC's property, had misappropriated and converted to his own use RM42m belonging to SRC with dishonest intention, which was to cause wrongful gain to himself and wrongful loss to SRC as defined under ss 23 and 24 of the Penal Code. The defence failed to cast any reasonable doubt on the prosecution's case (see para 2662).

(7) Although Najib was never formally appointed as a director of SRC, the evidence showed that he was, in essence and substance, a 'director' as defined under s 402A of the Penal Code or a shadow director since: (i) he acted in a manner the SRC directors were accustomed to act (this made him a s 402A director); and (ii) the SRC directors were accustomed to acting in accordance with Najib's instructions and directions (this made him a shadow director). A 'director' under s 402A (which would include

a shadow director) was an 'agent' under the same section; thus the element of 'agent' for the purposes of the CBT offences under s 409 had been proven (see paras 423–529).

(8) Even though there was no direct or specific evidence that Najib gave instructions for SRC's RM42m to be transferred to his personal accounts, the inference that he knew of the same was irresistible given the manner in which the funds ended up in his accounts and his immediate use of those funds once they were received. The inference of Najib's involvement in the misappropriation was premised on, among others, the roles played by Nik Faisal (the mandate holder for his accounts) and Datuk Azlin (his principal private secretary) in getting SRC's funds transferred through GMSB and IPSB and into Accounts 880 and 906. Since Najib must have been in regular communication with Nik Faisal, Datuk Azlin and also Jho Low (as evidenced by the Blackberry Messenger ('BBM') chats between Jho Low and PW54 and Jho Low holding himself out as the conduit for the alleged Arab donations) to ensure sufficiency of funds in his personal accounts at all times, such evidence gave rise to the inference that Najib must have known at all times of the balances in his personal accounts and also that the RM42m which came into his accounts on 26 December 2014 and 10 February 2015 were from SRC (see paras 722–736, 2620–2624, 2512 & 1801–1810).

(9) The reasons for the finding of knowledge and dishonest intention on Najib's part in relation to the commission of the CBT charges were as follows: Najib's averment in his affidavit dated 12 January 2016 filed in a defamation suit admitting that the RM42m that came into his personal accounts originated from SRC; the absence of any complaints to the bank on any unauthorised transactions with regard to any of his accounts during the relevant period of the charges or thereafter; the involvement of Nik Faisal and Datuk Azlin in attending to the transfers of the RM42m from SRC; Najib's own instruction, vide P277, to the bank to transfer RM32m to PBSB and PPC; the BBM chats with Jho Low which showed knowledge on Najib's part concerning the status and transactions involving his personal accounts; the swift utilisation of the RM42m upon its receipt; Najib's overarching control over SRC and the finding that he was a director (under s 402A of the Penal Code) entrusted with dominion over the property of the company; and, the absence of any action by Najib to clear his name or lodge a report with the authorities upon being notified by PW37 and PW49 that he had used SRC's funds. Najib also took no steps to return, and made no offer to return, the RM42m to SRC even after knowing that the sum was not part of the 'Arab donations' (see paras 2558, 2602–2608 & 2626–2627).

(10) Najib's defence that he honestly believed the funds in his accounts in 2014 and 2015 were from 'Arab donations', specifically from King

Abdullah, was a contrived defence that had to be rejected. In his testimony, Najib never said that King Abdullah had ever promised to send him money donations. He wholly believed Jho Low when the latter said the funds were from King Abdullah and relied upon the four Arab letters (D601–D604) that Jho Low produced as evidence of that. The authenticity of those letters was never proven at the trial. Najib did not know who wrote the letters or who the transferors of the funds were. He never bothered to verify Jho Low's claim that the funds were from King Abdullah but nevertheless spent the funds without even sending King Abdullah a note of acknowledgement or of gratitude for the 'donations'. Crucially, after the conclusion of the 13th General Election when he found he had excess funds in his accounts and did not want to keep them, Najib returned USD620m to the sender of the 'donations' in 2013 without any explanation. Despite doing that, in 2014, he mysteriously received another tranche of RM49m, unsolicited. There was no basis for Najib to believe that the RM42m that came into his accounts from SRC was part of that unsolicited RM49m because the evidence showed that he had already used up most of that RM49m before the RM42m arrived and between late 2014 and early 2015 (the relevant period of the charges), Najib spent more than triple the amount of RM49m. This raised the inference that Najib knew the funds in his accounts came from elsewhere. All this evidence tended to show that Najib never honestly believed the 'Arab donation' story and he was dishonest in contending that he held such a belief (see paras 2055, 2062, 2167, 2378, 2380, 2628 & 2633–2635).

The AMLATFPUAA charges:

(11) The prosecution had proven the three money-laundering charges under s 4(1) of AMLATFPUAA against Najib beyond reasonable doubt. The defence failed to cast any reasonable doubt on the prosecution's case on these charges (see para 2719).

(12) The evidence established that Najib had received RM42m from SRC into his two personal accounts (Nos 880 and 906) at Am-Islamic Bank on the dates and during the periods specified in the three charges and that the RM42m was 'proceeds of unlawful activity' as the predicate offences (ie, the MACC offence and the three CBT charges) on which the money laundering charges were based were proven to have been committed by Najib beyond reasonable doubt (see paras 967, 2664 & 2667).

(13) Najib never took steps to ensure that the RM42m that came into his personal accounts was not the proceeds of any unlawful activity and that the source of those monies was lawful. Despite there being reasonable cause to suspect the source of such huge funds in his accounts, Najib deliberately chose not to question or verify its source or its legitimacy so that he could deny knowledge. This was willful blindness, which the law treated as knowledge. The mens rea element of the offence under s 4(1),

as specified in s 4(2) of the AMLATFPUAA, had been proven by the prosecution beyond reasonable doubt warranting the application of the doctrine of willful blindness against Najib. Notwithstanding the finding of willful blindness, the defence failed to cast any reasonable doubt on the prosecution's case that Najib knew that the RM42m originated from SRC (see paras 2696–2697, 2709–2710 & 2717).

(14) Najib's defence that he had no knowledge of his account balances and had tasked the management of his personal accounts — particularly on ensuring that they had sufficient funds at all times for him to issue cheques — to Jho Low, Datuk Azlin and Nik Faisal was contrived and did not raise any reasonable doubt on the prosecution's case. The weight of the evidence gave the irresistible inference that not only did Najib know what his account balances were but he also knew that the accounts would be credited with funds, including from SRC, given that the funds from the main source, claimed to be from 'Arab donations', was then already depleting (see paras 2670–2687, 2690, 2699 & 2716).

Sentencing and stay of execution:

(15) Considering the seriousness of the charges in the instant case, the premeditation and deliberate planning with which the offences were committed, the loss of a colossal amount of public funds, Najib's betrayal of the trust that the citizens of this country had placed in him as PM and FM and the fact that he never expressed any remorse but continued to deny any knowledge of the RM42m, a jail term was an appropriate sentence for each of the seven charges. Since the imposition of a jail sentence under s 24 of the MACC Act obliged the court to also pass a sentence of fine, and given the very large amount of fine, the Court considered the option to fine Najib for the CBT charges and the money-laundering charges unnecessary (see paras 2911, 2914 & 2937–2938).

(16) The defence failed to show any good reason why the mitigation and sentencing process had to be deferred after Najib was convicted. But there were special circumstances for a stay of execution of the sentences of imprisonment and fine pending appeal under s 311 of the Criminal Procedure Code (or s 57 of the Courts of Judicature Act 1964) and these included the fact that the appeal would involve novel points of law, that Najib had no previous convictions and it was unlikely that he would become involved again in another offence whilst at liberty as he was presently answering criminal charges in two High Courts (see paras 2860, 2943 & 2946–2947).

[Bahasa Malaysia summary

Pada setiap masa material dalam tindakan ini tertuduh ('Najib') adalah Perdana Menteri ('PM') dan Menteri Kewangan ('FM') Malaysia. Dalam jawatannya

sebagai FM, dia juga Menteri Kewangan Pemerbadanan ('MOF Inc') yang, antara lain, dimiliki sepenuhnya oleh semua syarikat MOF Inc atas nama Kerajaan Malaysia. Pada 7 Januari 2011, sebuah syarikat sendirian berhad bernama SRC International Sdn Bhd ('SRC') ditubuhkan untuk melabur dalam projek yang berkaitan dengan penerokaan, pengekstrakan, pemprosesan dan perdagangan sumber tenaga konvensional dan boleh diperbaharui, sumber semula jadi dan mineral. Tidak lama selepas penggabungan SRC, perubahan dibuat pada artikel syarikat yang memberi Najib sebagai PM kuasa mutlak untuk melantik dan membuang anggota lembaga pengarah SRC dan menjadikannya sebagai 'Penasihat Emeritus' syarikat yang kelulusannya diperlukan untuk semua perkara besar yang mempengaruhi syarikat itu. Dalam setahun penubuhannya, SRC menjadi milik penuh MOF Inc, sehingga menjadikan Najib, sebagai MOF Inc, pemegang saham tunggal. Salah satu pengarah terawal SRC adalah Nik Faisal Ariff Kamil ('Nik Faisal') yang kemudian menjadi ketua pegawai eksekutifnya ('CEO') dan orang hubungan antara Najib dan lembaga pengarah SRC. Dia juga diberi kuasa oleh Najib untuk mengendalikan akaun peribadinya di Am-Islamic Bank Bhd/Ambank (terutamanya untuk memindahkan dana antara akaun). Nik Faisal dan pengarah SRC lain (PW42) adalah penandatangan yang sah untuk akaun SRC dan juga untuk akaun anak syarikat SRC, GMSB. Pada 3 Jun 2011, SRC dalam surat yang ditandatangani oleh Nik Faisal yang ditujukan kepada Najib sebagai PM dan FM menyatakan bahawa SRC memerlukan pinjaman bernilai RM3.95 bilion untuk mencapai objektifnya dan menyarankan agar pinjaman itu dapat datang dari Kumpulan Wang Persaraan (Diperbadankan) ('KWAP'). Najib membuat catatan mengenai surat tersebut yang menyetujui cadangan itu dan mengirimkan surat itu kepada Ketua Pegawai Eksekutif KWAP ('PW38'). Secara tidak konvensional, surat itu dihantar oleh setiausaha sulit utama Najib di pejabat PM ('Datuk Azlin') kepada PW38 di sebuah hotel di Kuala Lumpur setelah waktu pejabat. KWAP adalah agensi berkanun di bawah Kementerian Kewangan dan pengerusi lembaga adalah Ketua Setiausaha Kementerian Kewangan, yang melaporkan secara terus kepada PM. Pengerusi lembaga pada waktu material (PW45) juga mengetuai panel pelaburan KWAP ('IP') yang mempunyai kuasa tunggal, antara lain, untuk meluluskan pinjaman. IP mempertimbangkan permohonan SRC dan buat sementara waktu memutuskan untuk meluluskan pinjaman hanya RM1 bilion kerana adalah risiko sangat tinggi untuk memberikan RM3.95 bilion kepada syarikat yang tidak memiliki rekod sama sekali. Setelah PW45 dan PW38 bertemu Najib untuk memberitahunya keputusan IP, Najib memberitahu PW45 untuk mempercepat permohonan pinjaman yang mencadangkan bahawa 'RM2 bilion akan mencukupi'. 'Permintaan' ini disampaikan kembali ke IP yang anggotanya sekali lagi berunding dan kemudiannya menyetujui pinjaman sebanyak RM2 bilion kepada SRC tetapi tertakluk kepada pembayarannya yang dijamin oleh Kerajaan Malaysia. Pada 17 Ogos 2011, Najib mempengerusikan mesyuarat Kabinet untuk meluluskan pemberian jaminan kerajaan sebanyak RM2 bilion. Dua belas hari kemudian, pada 29 Ogos 2011,

A berdasarkan jaminan kerajaan, RM2 bilion telah dikeluarkan oleh KWAP kepada SRC dalam empat bahagian yang sama. Tujuh bulan kemudian, pada 13 Mac 2012, SRC memohon kepada KWAP untuk pinjaman tambahan berjumlah RM2 bilion dengan terma dan syarat yang sama dengan pinjaman pertama. Anehnya, satu bulan sebelum permohonan itu dibuat, bukan hanya
B mesyuarat Kabinet yang dipengerusikan oleh Najib (pada 8 Februari 2012) telah menyetujui jaminan kerajaan kedua untuk pinjaman tambahan RM2 bilion yang ingin diminta oleh SRC, tetapi Najib, sebagai MOF Inc, juga telah mengeluarkan arahan pemegang saham kepada dewan pengarah SRC yang mewajibkan mereka untuk meluluskan resolusi pekeliling untuk memohon
C pinjaman kedua. IP sekali lagi menemui dan menyetujui pinjaman bernilai RM2 bilion kedua tetapi keputusannya untuk melepaskannya kepada SRC secara bertahap 'ditolak' untuk satu pembayaran sekaligus setelah Najib bertemu dengan PW45, PW38 dan seorang timbalan ketua Perbendaharaan mengenai perkara itu. Di samping itu, Najib meminta PW45 untuk segera
D melepaskan RM2 bilion kedua kepada SRC bahkan sebelum jaminan rasmi kerajaan diberikan kepada KWAP. Walaupun praktik seperti ini belum pernah terjadi sebelumnya, ia tetap dipatuhi dengan alasan bahawa SRC memerlukan dana dengan segera untuk tujuan pelaburan. RM2 bilion kedua dikeluarkan kepada SRC pada 28 Mac 2012 dalam satu pembayaran dan jaminan kerajaan
E yang kemudian dikeluarkan untuknya telah bertarikh kebelakang kepada satu hari sebelum pengeluaran dibuat. Pada 24 Disember 2014, Am-Islamic Bank menerima arahan melalui emel daripada Nik Faisal dan PW42 untuk memindahkan RM40 juta dari SRC ke akaun GMSB di bank yang sama dan kemudian, pada hari yang sama, untuk memindahkan RM40 juta tersebut dari
F GMSB ke akaun Affin Bank syarikat lain, IPSB. Dua hari kemudian, iaitu pada 26 Disember 2014, dari RM40 juta yang diterima IPSB, masing-masing RM27 juta dan RM5 juta dipindahkan ke akaun bank sulit Najib (No 880 dan 906) di Am-Islamic Bank. Pindahan tersebut disahkan oleh pengarah urusan IPSB, PW37, yang mengatakan bahawa pada masa pemindahan dilakukan, dia
G tidak tahu tujuan mereka atau kepada siapa dana itu akan diberikan kerana kod kerahsiaan pada akaun. PW37 hanya diperintahkan untuk membuat pemindahan oleh PW49, yang merupakan Ketua Pegawai Eksekutif Yayasan Rakyat 1 Malaysia ('YR1M') yang, seterusnya, telah menerima arahan dari Datuk Azlin (setiausaha sulit utama Najib). PW37 mengatakan bahawa dia
H wajib melaksanakan arahan tersebut kerana YR1M membiayai operasi IPSB. Juga, Najib adalah pengerusi lembaga pemegang amanah YR1M di mana Datuk Azlin juga terlibat. Pada 5 dan 6 Februari 2015, Nik Faisal dan PW42 mengarahkan Am-Islamic Bank untuk memindahkan RM10 juta lagi dari SRC ke GMSB dan dari sana ke IPSB dari mana, pada 10 Februari 2015,
I PW37 membenarkan RM10 juta untuk dipindahkan ke dalam Akaun Najib 880 (jumlah kemudian dipindahkan ke Akaun 906). Sementara itu, menurut arahan bertulis Najib (eksh P277), Am-Islamic Bank pada 29 Disember 2014 memindahkan RM27 juta di Akaun 880 dan RM5 juta di Akaun 906 kepada masing-masing dua syarikat — PBSB dan PPC — yang, ternyata, pada bulan

Julai dan September 2014 telah meminjamkan kepada Najib jumlah yang sama untuk melaraskan akaun peribadinya yang sama ada kekurangan dana atau pengeluaran berlebihan kerana terlalu banyak perbelanjaan. Dan untuk RM10 juta yang dimasukkan ke dalam Akaun 906, Najib mengeluarkan beberapa siri cek pada awal tahun 2015 yang menghabiskan keseluruhan wang tersebut dalam beberapa hari melalui pembayaran kepada pelbagai individu dan organisasi, terutamanya untuk tujuan politik. Suatu ketika pada tahun 2015, apabila menjadi jelas bahawa SRC tidak dapat membayar faedah yang perlu dibayar atas pinjaman KWAP — yang mengancam akan mencetuskan kejadian ingkar yang akan menyebabkan KWAP meminta pembayaran segera jumlah pinjaman dengan faedah di bawah jaminan kerajaan — Kementerian Kewangan memutuskan untuk meluluskan tiga pinjaman jangka pendek (berjumlah RM650 juta) kepada SRC selama tiga tahun untuk membolehkannya membayar faedah kepada KWAP. Dua daripada pinjaman tersebut, berjumlah RM550 juta, dari dana gabungan, telah dibenarkan oleh Najib sendiri. Berikutan kejatuhannya setelah Pilihan Raya Umum Ke-14, yang menyaksikan perubahan dalam kerajaan, siasatan oleh Suruhanjaya Pencegahan Rasuah Malaysia (SPRM) terhadap pelbagai tuduhan dakwaan kesalahan oleh Najib menyebabkan tujuh tuduhan ini difailkan terhadapnya di Mahkamah Tinggi: (a) satu pertuduhan di bawah s 23 Akta SPRM 2009 yang mengatakan bahawa pada 17 Ogos 2011 dan 8 Februari 2012, Najib telah menggunakan jawatannya sebagai PM dan FM untuk gratifikasi sebanyak RM42 juta kepada dirinya sendiri kerana penglibatannya dalam keputusan Kerajaan Malaysia untuk menjamin pembiayaan RM4 bilion KWAP kepada SRC ('pertuduhan SPRM'); (b) tiga pertuduhan di bawah s 409 Kanun Keseksaan yang mengatakan bahawa antara 24 Disember 2014 dan 29 Disember 2014 dan sekali lagi antara 10 Februari 2015 dan 2 Mac 2015, Najib telah sebagai ejen, iaitu sebagai PM, FM dan Penasihat Emeritus SRC, dan dalam kapasiti yang diamanahkan dengan penguasaan lebih dari RM42 juta milik SRC, melakukan pecah amanah atas jumlah tersebut ('pertuduhan CBT'); dan (c) tiga pertuduhan pengubahan wang haram di bawah s 4(1) Akta Pencegahan Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil daripada Aktiviti Haram 2001 yang mengatakan bahawa pada 26 Disember 2014 dan 10 Februari 2015 Najib telah menerima di dalam Akaun No 880 dan 906 di Am-Islamic Bank Bhd sejumlah RM42 juta yang merupakan hasil daripda aktiviti haram ('pertuduhan AMLATFPUAA'). Semua pertuduhan dibicarakan bersama. Kes pendakwaan adalah bahawa Najib telah menyebabkan RM42 juta milik SRC dipindahkan ke dalam akaun peribadinya melalui GMSB dan IPSB (untuk mengelakkan pengesanan) dengan menyalahgunakan jawatan kuasa di kedua-dua SRC dan di dalam kerajaan dan secara peribadi mendapat keuntungan dari penggunaan dana. Sebilangan besar RM4 bilion yang KWAP telah meminjamkan kepada SRC hampir segera dipindahkan ke akaun di luar negara dan status sebenar dana tersebut tidak diketahui dengan segera. Pada akhir kes pendakwaan, mahkamah bicara mendapati bahawa kes prima facie telah dibuktikan dan

meminta Najib untuk membuat pembelaannya terhadap semua tuduhan. Antara lain, pembelaan utama pertuduhan adalah: (i) Najib tidak pernah mengetahui bahawa wang dari SRC masuk ke dalam akaun peribadinya kerana dia telah menyerahkan pengurusan akaunnya kepada Datuk Azlin, Nik Faisal dan individu lain yang bernama Jho Low dan menjadi tanggungjawab mereka untuk memastikan bahawa dia mempunyai dana yang mencukupi dalam akaunnya pada setiap masa untuk cek dikeluarkan; (ii) Najib percaya sepanjang masa material bahawa dana yang masuk ke dalam akaunnya dari tahun 2011–2013, dan sekali lagi pada tahun 2014, adalah sumbangan dari Raja Abdullah dari Arab Saudi. Kepercayaan ini sepenuhnya berdasarkan perwakilan yang dibuat kepada Najib oleh Jho Low yang rapat dengan keluarga diraja Saudi dan yang bahkan telah mengadakan pertemuan untuk Najib bertemu Raja Abdullah di Riyadh; (iii) Najib tidak mempunyai kepentingan peribadi dalam SRC dan penglibatannya dalam mesyuarat Kabinet untuk meluluskan jaminan kerajaan adalah bona fide dan perlu untuk memajukan kepentingan SRC sebagai syarikat MOF Inc; (iv) tidak ada kaitan rasuah antara penglibatan Najib dalam mesyuarat Kabinet untuk meluluskan jaminan kerajaan dan RM42 juta yang masuk dari SRC ke dalam akaun peribadinya; (v) Najib tidak pernah secara peribadi membenarkan pemindahan RM42 juta dari SRC dan ia mesti dilakukan oleh pihak ketiga untuk tujuan dan faedah tersendiri tanpa pengetahuan Najib; (vi) pihak pendakwaan belum membuktikan bahawa RM42 juta dalam pertuduhan CBT adalah milik SRC atau sama ada jumlah itu merupakan sebahagian daripada pembiayaan KWAP sebanyak RM4 bilion kepada SRC; (vii) lembaga pengarah SRC, dan bukan Najib, setiap masa secara eksklusif diberi kepercayaan untuk menguasai dana dan urusan syarikat; (viii) pihak pendakwaan tidak membuktikan unsur-unsur 'ketidakjujuran' dan 'penyelewengan' dalam pertuduhan CBT atau bahawa RM42 juta adalah 'hasil daripada aktiviti haram' dalam pertuduhan AMLATFPUAA; dan (ix) oleh kerana pihak pendakwaan tidak membuktikan bahawa Najib telah melakukan kesalahan predikat (iaitu, pertuduhan SPRM dan CBT) yang didasari oleh pertuduhan pengubahan wang haram, pertuduhan AMLATFPUAA tidak dapat bertahan.

Diputuskan, mensabitkan Najib atas semua tujuh pertuduhan dan menjatuhkan hukuman penjara 12 tahun dan denda RM210 juta (jika ingkar lima tahun penjara) atas pertuduhan SPRM dan penjara sepuluh tahun bagi setiap tiga pertuduhan CBT dan setiap tiga pertuduhan pengubahan wang haram di bawah AMLATFPUAA; memerintahkan agar hukuman tahanan dijalankan serentak dan membenarkan penangguhan pelaksanaan hukuman (kedua-dua penjara dan denda) sementara menunggu rayuan:

Pertuduhan SPRM:

(1) Kerana jawatannya sebagai PM dan FM, Najib dapat menyokong penubuhan SRC yang kemudian digunakannya untuk kepentingan peribadinya. Yang penting, dia berjaya mendapatkan SRC pembiayaan

RM4 bilion dari KWAP dan jaminan kerajaan untuk keseluruhan pembiayaan, semuanya dimungkinkan oleh kuasa utamanya di SRC — sebagai PM dengan kuasa (berdasarkan artikel SRC) untuk melantik dan memecat pengarahnya, sebagai Penasihat Emeritus di mana semua perkara penting yang mempengaruhi syarikat harus dirujuk, dan, kemudian, sebagai pemegang saham tunggal SRC sebagai MOF Inc. Kepentingan Najib dalam SRC bukanlah sesuatu yang sepenuhnya profesional dalam konteks pejabat awam tetapi menunjukkan kewujudan kepentingan sulit dan peribadi yang ditangkap oleh s 23 Akta SPRM 2009 (lihat perenggan 136, 139–140 & 1454).

(2) Kedua-dua ketua pegawai eksekutif KWAP (PW38) dan ketua lembaga dan panel pelaburan ('IP') (PW45) dilantik ke jawatan mereka di KWAP berdasarkan pelaksanaan kuasa FM. Dan PW45, sebagai Ketua Setiausaha Kementerian Kewangan, melaporkan secara terus kepada Najib sebagai FM. Oleh itu, pada setiap masa yang material, Najib memegang kedudukan yang lebih tinggi daripada mereka yang dia telah membuat 'permintaannya' dan oleh itu mempunyai pengaruh yang cukup besar (diakui oleh PW38 dalam keterangannya) terhadap keputusan yang mereka buat sebagaimana adanya, semua niat dan tujuan, pekerja bawahannya. Urusan Najib dengan 'pekerja bawahannya' dalam kes ini berada di luar proses yang sewajarnya dan 'permintaannya' dapat difahami sebagai arahan. Contoh pengaruh Najib adalah: ketika PW45 dan PW38 merasa berkewajiban untuk melaporkan kepada Najib mengenai keputusan awal IP untuk meluluskan hanya RM1 bilion kepada SRC; keputusan IP seterusnya untuk menyemak semula jumlah itu menjadi RM2 bilion sejajar dengan permintaan Najib; persetujuan IP untuk pembiayaan kedua sebanyak RM2 bilion kepada SRC setelah diberitahu bahawa FM telah memberi nasihat bahawa pembiayaan tambahan harus datang dari KWAP kerana Kerajaan telah meluluskan jaminan kedua untuknya; dan 'arahan' bahawa KWAP seharusnya tidak hanya melepaskan pembiayaan kedua dalam satu jumlah (bertentangan dengan keputusan awalnya untuk melepaskannya secara berperingkat) tetapi melepaskannya bahkan sebelum jaminan kerajaan formal untuk ia dikeluarkan (lihat perenggan 1305, 1307–1329 & 1380–1387).

(3) Keseluruhan tingkah laku dan penglibatan Najib, yang berdasarkan pada kawalan utama SRC, berada di luar kebiasaan dan di luar remit tingkah laku atau penglibatan biasa yang diharapkan oleh PM atau FM. Kehadirannya hanya dalam mesyuarat Kabinet yang meluluskan jaminan kerajaan sudah memadai untuk menjadi kesalahan di bawah s 23(1) Akta SPRM di mana mens rea untuk kesalahan itu dibuktikan ketika, pengetahuan konflik antara tugas awamnya dan kepentingan peribadi tetapi didorong oleh niatnya untuk mendapatkan gratifikasi, Najib gagal menyatakan kepentingannya terhadap SRC dalam mesyuarat Kabinet dan gagal menarik diri dari mesyuarat tersebut. Penglibatan

Najib dalam kelulusan jaminan kerajaan menyebabkan dana KWAP dilepaskan kepada SRC sehingga meletakkan Najib (yang memiliki kawalan penuh SRC) dalam kedudukan di mana dia dapat mengakses dana tersebut yang dapat dia gunakan sesuka hati. Kelebihan yang diperolehnya adalah gratifikasi dan actus reus kesalahan tersebut. Oleh itu, pihak pendakwaan telah membuktikan unsur 'penggunaan kedudukan untuk gratifikasi' dalam s 23(1) melampaui keraguan munasabah. Berdasarkan keseluruhan keterangan, pihak pembelaan gagal menimbulkan keraguan munasabah dalam kes pendakwaan di bawah s 23(1), apalagi berjaya membantah, atas imbangan kebarangkalian, anggapan berkanun di bawah s 23(2) Akta SPRM (lihat perenggan 1453, 1456, 1470, 1475–1478 & 1536).

(4) Seksyen 23(4) Akta SPRM tidak memiliki aplikasi dalam hal ini kerana penglibatan Najib dalam kelulusan jaminan kerajaan bukan untuk kemajuan kepentingan nasional atau untuk kepentingan dan keuntungan Kerajaan Malaysia. Dan, setelah wang dimasukkan ke dalam akaun SRC, tiada satu pun minit pemegang saham yang dikeluarkan oleh Najib sebagai pemegang saham tunggal SRC (sebagai MOF Inc) untuk penggunaan dana tersebut sesuai dengan justifikasi dan cadangan yang digariskan dalam kertas Kabinet, iaitu, objektif untuk mana SRC ditubuhkan. Pada masa yang sama, ini sekali lagi menunjukkan tindakan Najib dalam pengurusan mikro urusan SRC sejauh mana mengarahkan bagaimana pembiayaan daripada KWAP akan dibelanjakan (lihat perenggan 1496 & 1498).

(5) Pihak pendakwaan tidak perlu membuktikan bahawa RM42 juta yang masuk ke dalam akaun Najib adalah sebahagian daripada pembiayaan RM4 bilion yang diberikan oleh KWAP kepada SRC. Tiada pertikaian daripada keterangan, termasuk jejak wang yang RM42 juta itu berasal dari akaun SRC. Selagi ditunjukkan bahawa Najib berhasrat untuk mendapatkan wang milik SRC sebagai hasil keputusan yang dibuatnya ketika terdapat konflik kepentingan, kesalahan itu lengkap. Tiada keperluan untuk membuktikan bahawa wang yang masuk ke dalam akaun peribadinya adalah sebahagian daripada RM4 bilion dari KWAP. Bukti yang diperlukan adalah bahawa dana yang dimaksudkan adalah milik SRC. Bagaimana dana tersebut menjadi sebahagian daripada harta SRC adalah tidak relevan. Pertuduhan itu tidak menyatakan kaitan antara RM42 juta dan RM4 bilion. Bagaimanapun, Najib mengakui semasa memberi keterangan bahawa sebahagian besar dana di SRC berasal dari pinjaman KWAP (lihat perenggan 1508–1510).

Pertuduhan CBT:

(6) Berdasarkan keseluruhan keterangan, pihak pendakwaan telah membuktikan melampaui keraguan munasabah bahawa Najib adalah pengarah SRC (seperti yang didefinisikan di bawah s 402A Kanun

Keseksaan) dan sementara diberi kepercayaan untuk menguasai harta SRC, telah menyalahgunakan dan menukar untuk penggunaannya sendiri RM42 juta kepunyaan SRC dengan niat tidak jujur, iaitu untuk menyebabkan keuntungan yang salah untuk dirinya sendiri dan kerugian yang salah bagi SRC seperti yang didefinisikan di bawah ss 23 dan 24 Kanun Keseksaan. Pihak pembelaan gagal menimbulkan keraguan munasabah terhadap kes pendakwaan (lihat perenggan 2662).

(7) Walaupun Najib tidak pernah dilantik secara formal sebagai pengarah SRC, keterangan menunjukkan bahawa dia, pada dasar dan hakikatnya, adalah 'pengarah' seperti yang didefinisikan di bawah s 402A Kanun Keseksaan atau pengarah bayangan kerana: (i) dia bertindak dengan cara pengarah SRC biasa bertindak (ini menjadikannya sebagai pengarah s 402A); dan (ii) pengarah SRC biasa bertindak mengikut arahan Najib (ini menjadikannya pengarah bayangan). Seorang 'pengarah' di bawah s 402A (yang termasuk pengarah bayangan) adalah 'ejen' di bawah seksyen yang sama; oleh itu unsur 'ejen' untuk tujuan kesalahan CBT di bawah s 409 telah terbukti (lihat perenggan 423–529).

(8) Walaupun tidak ada keterangan langsung atau spesifik bahawa Najib memberikan arahan agar RM42 juta SRC untuk dipindahkan ke akaun peribadinya, kesimpulan bahawa dia tahu perkara yang sama tidak dapat ditolak kerana cara dana tersebut dimasukkan ke dalam akaunnya dan penggunaan dana tersebut dengan segera setelah ia diterima. Kesimpulan mengenai penglibatan Najib dalam penyelewengan itu didasarkan, antara lain, peranan yang dimainkan oleh Nik Faisal (pemegang amanah untuk akaunnya) dan Datuk Azlin (setiausaha sulit utamanya) dalam memindahkan dana SRC melalui GMSB dan IPSB dan ke dalam Akaun 880 dan 906. Oleh kerana Najib semestinya berkomunikasi secara berkala dengan Nik Faisal, Datuk Azlin dan juga Jho Low (seperti yang dibuktikan oleh perbualan Blackberry Messenger ('BBM') antara Jho Low dan PW54 dan Jho Low menyatakan dirinya sebagai saluran untuk sumbangan Arab yang didakwa) untuk memastikan kecukupan dana dalam akaun peribadinya setiap masa, keterangan tersebut menimbulkan kesimpulan bahawa Najib mesti mengetahui sepanjang masa baki dalam akaun peribadinya dan juga bahawa RM42 juta yang masuk ke dalam akaunnya pada 26 Disember 2014 dan 10 Februari 2015 berasal daripada SRC (lihat perenggan 722–736, 1801–1810, 2512 & 2620–2624).

(9) Sebab-sebab penemuan pengetahuan dan niat tidak jujur di pihak Najib berhubung dengan pelaksanaan pertuduhan CBT adalah seperti berikut: kenyataan Najib dalam afidavitnya bertarikh 12 Januari 2016 difailkan dalam guaman fitnah yang mengakui bahawa RM42 juta yang masuk ke dalam akaun peribadinya berasal dari SRC; ketiadaan sebarang aduan kepada bank mengenai sebarang transaksi yang tidak dibenarkan

berkenaan dengan mana-mana akaunnya dalam tempoh pertuduhan yang berkaitan atau selepas itu; penglibatan Nik Faisal dan Datuk Azlin dalam urusan pemindahan RM42 juta dari SRC; arahan Najib sendiri, melalui P277, untuk bank untuk memindahkan RM32 juta ke PBSB dan PPC; perbualan BBM dengan Jho Low yang menunjukkan pengetahuan bahagian Najib mengenai status dan transaksi yang melibatkan akaun peribadinya; penggunaan pantas RM42 juta setelah penerimaannya; kawalan utama Najib terhadap SRC dan penemuan bahawa dia adalah pengarah (di bawah s 402A Kanun Keseksaan) yang diberi kepercayaan untuk menguasai harta syarikat; dan, ketiadaan tindakan Najib untuk membersihkan namanya atau membuat laporan kepada pihak berkuasa setelah diberitahu oleh PW37 dan PW49 bahawa dia telah menggunakan dana SRC. Najib juga tidak mengambil langkah untuk mengembalikan, dan tidak membuat tawaran untuk mengembalikan, RM42 juta kepada SRC walaupun setelah mengetahui bahawa jumlah itu bukan sebahagian dari 'sumbangan Arab' (lihat perenggan 2558, 2602–2608 & 6726–2627).

(10) Pembelaan Najib bahawa dia dengan jujur mempercayai dana dalam akaunnya pada tahun 2014 dan 2015 adalah daripada 'sumbangan Arab', khususnya daripada Raja Abdullah, adalah pembelaan yang harus ditolak. Dalam keterangannya, Najib tidak pernah mengatakan bahawa Raja Abdullah pernah berjanji akan mengirimkan wang sumbangan kepadanya. Dia benar-benar mempercayai Jho Low ketika yang Jho Low mengatakan dana itu berasal daripada Raja Abdullah dan bergantung pada empat surat Arab (D601–D604) yang dihasilkan oleh Jho Low sebagai bukti tersebut. Keaslian surat-surat tersebut tidak pernah dibuktikan pada perbicaraan. Najib tidak tahu siapa yang menulis surat itu atau siapa yang memindahkan dana tersebut. Dia tidak pernah peduli untuk mengesahkan dakwaan Jho Low bahawa dana tersebut berasal daripada Raja Abdullah tetapi tetap membelanjakan dana tersebut tanpa mengirim Raja Abdullah nota penghargaan atau terima kasih atas 'sumbangan' itu. Terutamanya, setelah berakhirnya Pilihan Raya Umum Ke-13 ketika dia mendapati dia mempunyai lebihan dana dalam akaunnya dan tidak mahu menyimpannya, Najib mengembalikan USD620 juta kepada pengirim 'sumbangan' pada tahun 2013 tanpa penjelasan. Walaupun melakukannya, pada tahun 2014, dia secara misteri menerima sejumlah RM49 juta lagi, tanpa diminta. Tiada asas bagi Najib untuk mempercayai bahawa RM42 juta yang masuk ke dalam akaunnya dari SRC adalah sebahagian daripada RM49 juta yang tidak diminta kerana bukti menunjukkan bahawa dia telah menghabiskan sebahagian besar RM49 juta itu sebelum RM42 juta itu tiba dan antara akhir 2014 hingga awal 2015 (tempoh yang berkaitan dengan pertuduhan tersebut), Najib membelanjakan lebih daripada tiga kali ganda jumlah RM49 juta. Ini menimbulkan kesimpulan bahawa Najib

mengetahui dana dalam akaunnya berasal dari tempat lain. Semua keterangan ini cenderung menunjukkan bahawa Najib tidak pernah jujur mempercayai kisah 'sumbangan Arab' dan dia tidak jujur dengan mengatakan bahawa dia memegang kepercayaan seperti itu (lihat perenggan 2055, 2062, 2167, 2378, 2380, 2628 & 2633–2635).

Pertuduhan AMLATFPUAA:

(11) Pihak pendakwaan telah membuktikan tiga pertuduhan pengubahan wang haram di bawah s 4(1) AMLATFPUAA terhadap Najib tidak diragukan lagi. Pihak pembelaan gagal menimbulkan keraguan munasabah terhadap kes pendakwaan atas pertuduhan ini (lihat perenggan 2719).

(12) Keterangan membuktikan bahawa Najib telah menerima RM42 juta dari SRC ke dalam dua akaun peribadinya (No 880 dan 906) di Am-Islamic Bank pada tarikh dan dalam tempoh yang dinyatakan dalam ketiga-tiga pertuduhan tersebut dan bahawa RM42 juta adalah 'hasil daripada aktiviti haram' kerana kesalahan predikat (iaitu, kesalahan SPRM dan ketiga-tiga tuduhan CBT) yang didasari oleh tuduhan pengubahan wang haram telah terbukti dilakukan oleh Najib tanpa keraguan munasabah (lihat perenggan 967, 2664 & 2667).

(13) Najib tidak pernah mengambil langkah untuk memastikan bahawa RM42 juta yang masuk ke dalam akaun peribadinya bukan hasil daripada sebarang aktiviti haram dan sumber wang tersebut sah. Walaupun ada alasan yang munasabah untuk mencurigai sumber dana sebesar itu di dalam akaunnya, Najib sengaja memilih untuk tidak mempersoalkan atau mengesahkan sumbernya atau kesahihannya supaya dia dapat menolak pengetahuan. Ini adalah *willful blindness*, yang dianggap undang-undang sebagai pengetahuan. Elemen mens rea kesalahan di bawah s 4(1), seperti yang dinyatakan dalam s 4(2) AMLATFPUAA, telah dibuktikan oleh pihak pendakwaan melampaui keraguan munasabah yang membenarkan penggunaan doktrin *willful blindness* terhadap Najib. Meskipun terdapat *willful blindness*, pihak pembelaan gagal menimbulkan keraguan munasabah terhadap kes pendakwaan bahawa Najib mengetahui bahawa RM42 juta itu berasal daripada SRC (lihat perenggan 2696–2697, 2709–2710 & 2717).

(14) Pembelaan Najib bahawa dia tidak mengetahui baki akaunnya dan telah menugaskan pengurusan akaun peribadinya — terutama untuk memastikan bahawa mereka mempunyai dana yang mencukupi setiap masa untuk dia mengeluarkan cek — kepada Jho Low, Datuk Azlin dan Nik Faisal adalah dibuat-buat dan tidak menimbulkan keraguan yang munasabah terhadap kes pendakwaan. Berat keterangan tersebut memberikan kesimpulan yang tidak dapat ditolak bahawa bukan sahaja Najib mengetahui baki akaunnya tetapi dia juga tahu bahawa akaun akan dikreditkan dengan dana, termasuk daripada SRC, memandangkan dana

daripada sumber utama, didakwa berasal dari 'sumbangan Arab', sudah habis (lihat perenggan 2670–2687, 2690, 2699 & 2716).

Hukuman dan penangguhan pelaksanaan:

(15) Memandangkan betapa seriusnya pertuduhan dalam kes ini, perancangan awal dan sengaja dengan kesalahan itu dilakukan, kehilangan sejumlah besar dana awam, pengkhianatan Najib terhadap kepercayaan yang diberikan oleh rakyat negara ini sebagai PM dan FM dan fakta bahawa dia tidak pernah menyatakan penyesalan tetapi terus menafikan sebarang pengetahuan mengenai RM42 juta, hukuman penjara adalah hukuman yang sesuai untuk setiap tujuh pertuduhan itu. Oleh kerana pengenaan hukuman penjara di bawah s 24 Akta SPRM mewajibkan Mahkamah juga menjatuhkan hukuman denda, dan dengan jumlah denda yang sangat besar, Mahkamah mempertimbangkan pilihan untuk mendenda Najib atas pertuduhan CBT dan pengubahan wang haram adalah tidak perlu (lihat perenggan 2911, 2914 & 2937–2938).

(16) Pihak pembelaan gagal menunjukkan alasan yang kukuh mengapa proses mitigasi dan hukuman terpaksa ditangguhkan setelah Najib disabitkan. Tetapi terdapat keadaan khas untuk penangguhan pelaksanaan hukuman penjara dan denda sementara menunggu rayuan di bawah s 311 Kanun Prosedur Jenayah (atau s 57 Akta Mahkamah Kehakiman 1964) dan ini termasuk fakta bahawa rayuan itu akan melibatkan perkara undang-undang yang baru, bahawa Najib tidak mempunyai sabitan sebelumnya dan tidak mungkin dia akan terlibat lagi dalam kesalahan lain semasa bebas kerana ketika ini dia menjawab pertuduhan jenayah di dua Mahkamah Tinggi (lihat perenggan 2860, 2943 & 2946–2947).]

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Tommy Thomas (Sithambaran a/l Vairavan, Manoj Kurup, Ishak Mohd Yusoff, Suhaimi Ibrahim, Donald Joseph Franklin, Muhammad Saifuddin Hashim Musaimi, Sulaiman Kho Kheng Fuei, Budiman Lutfi Mohamed, Mohd Ashrof Adrin Kamarul and Muhammad Izzat Fauzan with him) (Attorney General's Chambers) for the prosecution.

Muhammad Shafee Abdullah (Mohd Yusof Zainal Abiden, Kamarul Hisham Kamaruddin, Harvinderjit Singh, Farhan Read, Wan Aizuddin Wan Mohammed, Rahmat Hazlan, Muhammad Farhan Shafee, Nur Syahirah bt Hanapiah and Zahria Eleena with him) (Shafee & Co) for the defense.

Mohd Nazlan J:

INTRODUCTION

[1] This is the first in a series of criminal prosecutions against the accused, who when the charges were filed, was the immediate former Prime Minister of Malaysia.

[2] After having called for the accused to enter his defence at the end of the prosecution case, and having evaluated the entire evidence at the close of the case, with the benefit of hearing submissions from the parties, I delivered my decision to convict the accused on all seven charges, and highlighted the principal reasons for the same. This judgment contains the full reasons for my decision.

THE BACKGROUND

[3] The accused was the sixth Prime Minister of the nation. He was the country's chief executive for about nine years. The accused first took his oath of office succeeding the fifth Prime Minister on 3 April 2009, and subsequently re-appointed a day after the Thirteenth General Election on 6 May 2013. He was also appointed the minister of finance ('the Finance Minister') throughout a period which was co-terminus with his holding the position of the Prime Minister.

[4] The prosecution had preferred seven criminal charges against the accused — three concerning the offence of criminal breach of trust ('CBT') under s 409 the Penal Code, a single charge of abuse of position for gratification under s 23 of the Malaysian Anti-Corruption Commission Act 2009 ('the MACC Act'), and three charges under s 4(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLATFPUAA').

[5] The seven charges were registered on two different dates, about one month apart. The charges for offences under the Penal Code and the MACC Act were filed on 4 July 2018, and the remainder three charges, for offences under the AMLATFPUAA were filed subsequently on 8 August 2018, when all seven charges were ordered to be jointly tried, as agreed by the parties.

[6] The accused pleaded not guilty to all the charges and asked to be tried. On 10 August 2018, this court fixed the trial of the seven charges to commence on 12 February 2019 and to continue at least until 29 March 2019.

[7] Following decisions made by this court on a number of interlocutory applications, specifically four in total, namely the refusal of the granting of a gag order, the dismissal of the application to produce letter of appointment of the ad hoc prosecutor, the refusal of the delivery to the defence of statements recorded by witnesses not intended to be called as prosecution witnesses, and the transfer of the case from the sessions court by this court at its own motion under s 417 of the Criminal Procedure Code following the withdrawal of the s 418A transfer certificate by the attorney general (which had initially transferred the case from the sessions court to this High Court), the accused, as the

applicant in the Court of Appeal succeeded on the eve of the trial on 11 February 2019 in obtaining a stay of all proceedings in respect of the seven charges pending disposal of the appeal at the Court of Appeal.

[8] At the conclusion of the appeals in March 2019, where the Court of Appeal allowed one out of the four, the Court of Appeal granted another stay pending the decision of the Federal Court given the further appeals filed by the parties. On 27 March 2019 however, the Federal Court set aside the stay, enabling this court on the day after on 28 March 2019 to fix 3 April 2019 as the new start date of the trial originally scheduled to commence on 12 February 2019. On 10 April 2019, the Federal Court affirmed all the four decisions of this court.

[9] On the day of 3 April 2019 appointed to start the trial however, the accused filed an application to strike out all the charges against him. And at the start of the proceedings at 2pm on that day the accused requested that the said application be heard first. I refused the request after hearing submissions.

[10] In refusing, I had stated that there was no impediment to the trial to commence first especially since despite the charges having been filed in July and August 2018, and notwithstanding that the defence having made a number of interlocutory applications, which had all been heard during the period of several months thereafter, in relation to which the decisions of this court have all been affirmed by the Federal Court, the applicant chose only to file this strike out application at the eleventh hour — literally only about four hours before the trial proper of the case was scheduled to begin at 2pm on 3 April 2019.

[11] I then fixed another date for the hearing of the striking out application, and ordered the trial to commence, as previously directed.

[12] At the prosecution stage of the trial, the prosecution called 57 witnesses over 57 days during a period that began on 3 April 2019 and closed on 27 August 2019. Some media reports stated that the prosecution case took 58 days. That is not accurate. The one other day was in fact set aside for the hearing of the application to strike out the charges against the accused. The accused was also not successful in that application which was heard on 22 April 2019. A notice of appeal challenging the decision was filed but subsequently withdrawn by the accused. After the close of the prosecution case, after giving parties time to prepare for written and reply submissions and subsequent to hearing oral submissions in October 2019, I gave my decision on 11 November 2019 to call the accused to enter his defence on all seven charges. The defence stage started on 3 December 2019. The accused called 19 witnesses during a period of 29 days. The defence closed its case on 11 March 2020. Immediately

however, the week after the government declared the imposition of a movement control order nationwide effective 18 March 2020 due to the Covid-19 pandemic. This delayed the submission sessions which eventually took place first week of June 2020. On 28 July 2020, I delivered the verdict of this court.

SUMMARY OF KEY BACKGROUND FACTS

[13] In order to ensure better navigation and thus appreciation of the labyrinth of facts of this case, I shall next in summary fashion set out the salient background facts in terms that are chronological but in a context that accords with the factual matrix of the case. Some of the facts will however emerge in later sections on my analysis of the evidence as they would be better understood when mentioned in such fashion.

[14] There are, as stated earlier, seven charges which allege the commission of three types of offences under the law. All seven charges make mention of SRC International Sdn Bhd ('SRC'). This then, I think, is an appropriate starting point.

[15] SRC is a private limited company. It was incorporated under the Companies Act 1965 on 7 January 2011. One of its two subscriber shareholders was one Nik Faisal Ariff Kamil ('Nik Faisal'), who would later become its first chief executive officer ('CEO'), and the other being Vincent Beng Huat Koh. It is stated as one of its key objects in the company's memorandum of association (P15) that SRC was incorporated to identify and invest in projects associated with the exploration, extraction, processing and trading of conventional and renewable energy resources, natural resources and minerals.

[16] On the date of the incorporation of SRC, apart from being a subscriber shareholder of SRC, Nik Faisal was the chief investment officer of 1Malaysia Development Bhd ('1MDB'). 1MDB was originally incorporated in 2008 as Terengganu Investment Authority ('TIA'), but subsequently on 31 July 2009 became wholly owned by the Minister of Finance Incorporated ('MOF Inc'). It was established to drive strategic initiatives for the long term economic development for the country, particularly in the areas of energy and real estate. Another key personality was one Low Taek Jho or Jho Low, who was the special adviser to TIA, and upon the change to 1MDB, to the board of advisors of 1MDB.

[17] In a letter dated 24 August 2010 (P356) addressed to the accused in his capacity as the Prime Minister and Finance Minister, the CEO of 1MDB, Shahrol Azral Helmi requested for a RM3 billion grant to set up SRC, stated

therein as a strategic resource vehicle to maintain strategic stakes in key resources such as coal, alumina, uranium and iron as well as oil and gas. The primary object for the establishment of SRC was to carry out and invest in projects associated with conventional and renewable energy resources, natural resources and minerals.

[18] The accused as the Prime Minister wrote a minute on this 1MDB letter his request to Tan Sri Nor Mohamed Yakcop, as the Minister in charge of the Economic Planning Unit ('EPU'), in the Prime Minister Department to study the same. The accused's exact words, as written, were 'Untuk dikaji dan dibuat ulasan'. The significance of this choice of words will become clear later. The latter in turn instructed the director general ('DG') of the EPU to evaluate the request by 1MDB.

[19] The DG of the EPU in a memo dated 12 October 2010 addressed to the Prime Minister through the Minister in the Prime Minister's Department (EPU) (P357) stated that whilst the setting up of SRC was supported, its proposed focus ought to be confined only to coal and uranium. The EPU's stance was for the strategic energy resources in respect of the extraction and importation of oil and gas ought to be continued to be pursued by Petronas, whilst the iron and alumina sectors, which were deemed less strategic to the requirements of the country, should be driven by the private sector as presently. The EPU suggested that that funding for SRC should be sourced from the financial institutions instead and concluded that an award of a grant of RM3 billion would be declined but a launching grant of RM20m be given to set up SRC and fund its initial activities. It is imperative to note that this position and recommendation of the EPU were agreed and accepted by both the Prime Minister (P358) and the Minister in the Prime Minister's Department (EPU).

[20] In a letter dated 3 June 2011 from SRC (P364), signed by Nik Faisal, then a director of SRC, which was addressed to the accused in his capacity as the Prime Minister and Finance Minister it was stated that to further pursue the strategic plans of SRC, its funding should be in the form of a loan of RM3.95 billion to be obtained from *Kumpulan Wang Persaraan (Diperbadankan)* ('KWAP').

[21] The accused on 5 June 2011 wrote a minute on the SRC letter (P364), in a note addressed to Datuk Azian Mohd Noh (PW38) the CEO of KWAP that the former agreed with the proposal by SRC. The accused wrote in the Malay language — 'YBhg Datuk Azian, setuju dengan cadangan ini'.

[22] That particular SRC letter (P364) addressed to the accused, and subsequently noted by the accused for the CEO of KWAP was then hand delivered by Datuk Azlin Alias (since deceased), who was the principal private

secretary of the Prime Minister from the Prime Minister's Office (PMO) to the CEO of KWAP. The CEO of KWAP (PW38) was for this purpose contacted by Datuk Azlin to meet at a hotel in KL Sentral after office hours for that letter bearing the minute by the accused to the CEO of KWAP to be personally handed over to her.

[23] This then led KWAP to start the process dealing with the application in the said SRC letter within its organisation which the CEO asked to be handled by its fixed income department. Although witnesses from KWAP testified that there were a number of uncommon features about this application since first, it came through the accused as the Prime Minister and Finance Minister directly to the CEO of KWAP (as opposed to the usual situation where potential borrowers would send in an application to KWAP) secondly, there were some difficulties with the availability of supporting documents which by and large remained not forthcoming from SRC, and thirdly, the process within KWAP was said to be rushed, the approvals process for the same still did go through the correct and proper procedure.

[24] After the fixed income department prepared the proposal paper, the management team of KWAP would then have to clear the same in which case the CEO would sign off the proposal paper as having approved the paper for tabling to the investment panel, being the only party having the authority under the statute which set up KWAP, the Retirement Fund Act 2007, to approve loans taken from KWAP. Eventually the investment panel approved a financing of RM2 billion in 2011, and an additional RM2 billion in 2012.

[25] These approvals were principally granted on the strength of the two government guarantees that the Cabinet approved to guarantee the repayment of the aggregate principal loan amount of RM4 billion by SRC to KWAP. The applications by SRC for the guarantees were made to and processed by the Ministry of Finance. The accused's participation at the two relevant meetings of the Cabinet to approve the government guarantees of RM2 billion is the basis of the charge of the use of position for gratification against the accused under s 23 of the MACC Act.

[26] Later, on 24 December 2014 Am-Islamic Bank via an email received a scanned copy of a written instruction signed by Nik Faisal and Dato' Suboh Yassin (PW42), who were directors and signatories of SRC. The instruction was for the transfer of RM40m from SRC's current account No 2112022010650 to be deposited into the current account of Gandingan Mentari Sdn Bhd ('GMSB') — account No 888100380694 which was maintained at the same bank.

[27] On the same date, GMSB issued a transfer instruction to Am-Islamic Bank signed by the same two signatories as in SRC (as the two were also directors and signatories of GMSB) to effect the transfer of the same amount of RM40m into the current account No 106810001108 at Affin Bank under the name of Ihsan Perdana Sdn Bhd ('IPSB'). A B

[28] Two days later, on 26 December 2014, of the RM40m received from GMSB, a sum of RM27m was transferred out of IPSB's account and credited into a personal Am-Islamic Bank current account No 2112022011880 ('Account 880') which was also known and coded as the 'AmPrivate-1MY' account in AmBank. C

[29] I digress briefly to state that although the current accounts of the accused are in the nature of Islamic banking account — hence the reference to Am-Islamic Bank accounts, the Account 880 and other personal Am-Islamic Bank accounts of the accused, namely Accounts 898 and 906, as well as the earlier Account 694 were therefore maintained at Am-Islamic Bank, certain banking services were provided by other entities within the AmBank Group, such as AmBank and Am-Investment Bank. As such this judgment may at times refer to these entities interchangeably as AmBank. D E

[30] On the same date of 26 December 2014, IPSB made another transfer of RM5m out of its Affin Bank account, whereby this sum was credited into another current account of the accused, also maintained at Am-Islamic Bank bearing the account No 2112022011906 ('Account 906'), and was also known and coded as the 'Am-Private-MY' account. In short, at the close of business on 26 December 2014, RM32m was credited into Accounts 880 and 906 which belonged to the accused. F G

[31] Soon after, on 29 December 2014, from the amount received from IPSB, on the instructions of the accused to Am-Islamic Bank dated 24 December 2014 (P277), Am-Islamic Bank transferred RM27m from the Account 880 to the account of Permai Binaraya Sdn Bhd ('PBSB') and also a further transfer of RM5m from Account 906 to the account of Putra Perdana Construction Sdn Bhd ('PPC'). Both the accounts of PBSB and PPC were held at Maybank. H

[32] On 5 and 6 February 2015, two instruction letters signed by the same two signatories of SRC were issued to Am-Islamic Bank to effect the transfer of a sum of RM10m in two tranches of RM5m each to GMSB. The monies were then transferred by GMSB into IPSB's account. On 10 February 2015, IPSB effected a transfer of the RM10m into the accused's Account 880. On the same I

day, Nik Faisal issued an instruction letter to Am-Islamic Bank for the RM10m received from IPSB to be transferred from Account 880 to the accused's Account 906.

[33] It is an important fact in this case that Nik Faisal, in addition to being the CEO and director as well as an authorised signatory of SRC had also been appointed by the accused as the latter's 'Authorised Personnel' or agent to operate the personal accounts of the accused at AmBank on the terms and conditions which were confined to instructing transfers of funds amongst the accounts of the accused. As the mandate holder, Nik Faisal could not withdraw funds from or issue personal cheques of the accused out of the said personal accounts of the accused.

[34] At the same time, during the period of between December 2014 and February 2015, a total of 15 cheques were issued by the accused; with one cheque from the Am-Islamic Bank account No 2112022011898 ('Account 898') or also known and coded as the 'AmPrivate-Y1MY' account. 14 other cheques were issued from the accused's Account 906.

[35] The inward transfers of the aggregate of RM42m from SRC into Accounts 880 and 906 of the accused, which were effected on 26 December 2014 and 10 February 2015 are the crux of all the seven charges against the accused.

[36] As the Prime Minister, the accused was during the material period vested with the authority to appoint and dismiss directors of SRC and to approve any amendments to the company's memorandum and articles of association (M&A), was its advisor emeritus under the company's M&A, and as the Finance Minister was in the capacity as MOF Inc the sole shareholder of SRC.

[37] More of the facts will emerge as this judgment progresses. They will be examined in the relevant context of the analyses that follow.

THE SUMMARY OF PROSECUTION CASE

[38] The narrative of the case for the prosecution as it unfolded in the process of the evidence given by the witnesses for the prosecution may be stated in summary fashion in the paragraphs that will next follow.

The subject company and borrower — SRC

[39] The essence of the submission of the prosecution concerning SRC is the overarching point that in addition to MOF Inc being the shareholder of SRC

(initially indirectly through 1MDB which MOF Inc wholly owns), by the express terms of the constitution of the company — its memorandum and articles of association ('M&A') — which provisions were contractually binding on all the parties, including particularly, SRC and the accused, the accused wielded supreme authority in the company.

[40] This was the case because first, article 67 of the M&A of SRC conferred on the accused and no other, in his capacity as the Prime Minister, the power to appoint and remove members of the board of directors of SRC. Secondly, by a special resolution signed by the accused, this time in his capacity as the sole entity lawfully acting as MOF Inc being the only shareholder of SRC, the M&A was amended with the incorporation of a new article 117 which provided for the appointment of the Prime Minister, who was again, the accused, as the advisor emeritus of SRC. Thirdly, the powers of the advisor emeritus in the said article 117 compelled all major investment and strategic decisions of SRC to be first referred to the advisor emeritus for approval.

[41] Thus, other that the appointment of the first two directors which were specified in the M&A as is the usual requirement, additional appointments of the company's board members had been subsequently effected pursuant to article 67 by the accused as the Prime Minister as evidenced in a letter signed by him dated 1 August 2011 which letter also specified the appointment of Nik Faisal as the chief executive officer ('CEO') of SRC.

The lender – KWAP

[42] The memorandum of 12 October 2010 (P357), concurred by the accused as the Prime Minister, where the EPU agreed to give only RM20m as a start-up grant instead of the SRC-proposed RM3.95 billion also suggested that funding for SRC investments and operations should be sourced from banks and the financial markets. But what then transpired was the letter dated 3 June 2011 from SRC, signed off by its CEO, Nik Faisal to the accused, as both the Prime Minister and the Finance Minister, proposing that a financing be obtained from KWAP. The accused agreed to the request by SRC for this funding of RM3.95 billion and noted on the letter 'YBhg Dato' Azian, bersetuju dengan cadangan ini'. As stated earlier, this same letter was handed over to Dato' Azian Mohd Noh (PW38), the CEO of KWAP then by the late Datuk Azlin Alias, who was the principal private secretary to the Prime Minister. This letter became the application to KWAP. The prosecution argues that the political reality is that when the Prime Minister or Finance Minister stated that he agreed with the proposal, no other officer in the government or SRC would contradict him. Instead, so the prosecution submitted, the same would be acted upon, as it actually transpired in the instant case.

[43] The proposal papers for the investment panel of KWAP had initially suggested the approval of a loan of RM1 billion to SRC, because, among others, the company was a newly formed entity without any track record whatsoever in its proposed field of venture. The papers to the investment panel highlighted that the very large loan amount of the proposed RM3.95 billion could, if approved, result in a major single borrower over concentration risk to KWAP as a lender.

[44] The prosecution highlighted that whilst the loan application was still in the process of being deliberated by the investment panel which had at that juncture proposed the granting of a RM1 billion loan subject to verification of certain matters on SRC, the chairman of the investment panel, Tan Sri Wan Abdul Aziz Wan Abdullah (PW45), who was also at the point in time, the Secretary General of the Ministry of Finance, the highest ranking civil servant in the MOF who reported to the accused as the Finance Minister of the country, was personally informed by the accused to expedite the loan application approval process and even specifically told that a loan of RM2 billion would suffice, contrary to the RM1 billion prepared to be approved by the investment panel.

[45] The request by the accused was even relayed to the special meeting of the investment panel on 19 July 2011 (P372), as recorded in the minutes (P417). The investment panel then agreed to approve the loan of RM2 billion to SRC, albeit subject to a government guarantee by the Government of Malaysia to secure the said proposed RM2 billion loan to be granted by KWAP to SRC.

The MOF – The government guarantee

[46] The prosecution submitted that such actions by the accused to the government officials in MOF where he led as the Finance Minister constitute an instruction, and were in fact acted upon. To obtain the first government guarantee for the RM2 billion, Nik Faisal as the CEO of SRC then wrote a letter to MOF to apply for the first government guarantee. He met Maliami Hamad (PW44) the Secretary of the Loan Management, Financial Market and Actuary Division at the MOF on Friday 12 August 2011, and later met Afidah Azwa Abdul Aziz (PW41), the officer in charge of the government guarantee application on Monday 15 August 2011.

[47] PW41 testified that at this meeting she was shown by Nik Faisal the letter dated 3 June 2011 to the Prime Minister which bore the note by the accused addressed to the CEO of KWAP. PW41 had to expedite the preparation of the papers to be presented to the Cabinet meeting (*Majlis Jemaah Menteri*) ('MJM') because she had been instructed to submit the same

to the Cabinet Division on the same day so that the papers would be ready for approval by the Cabinet at its meeting on 17 August 2011, merely two days later.

[48] The very short notice for the preparation of the MJM was according to PW41 unprecedented, and neither was she able to gather adequate materials and information for inclusion into the MJM. Instead PW41 was made to depend on whatever little information provided by Nik Faisal himself to be included in the MJM paper for the Cabinet meeting.

[49] It was clear to PW41 that she acted in the fashion that she did because, as she testified, she considered the letter from the accused of 3 June 2011 as a direction which she had to obey. She even gave evidence that she was told that SRC was the accused's company, or in her words *'syarikat PM'*.

[50] The prosecution contended that the extent of the involvement of the accused at the MOF in other aspects concerning SRC is supported by the evidence given by other senior officials in the MOF which included Tan Sri Wan Abdul Aziz Wan Abdullah (PW45), the Secretary General of the MOF then, Dato' Mat Noor Nawi (PW44), a deputy Secretary General, Datuk Fauziah Yaacob (PW53), another deputy Secretary General, as well as PW43.

[51] The first government guarantee was approved at the Cabinet meeting on 17 August 2011 chaired by the accused, and the guarantee document was subsequently signed on 26 August 2011 by the Second Finance Minister, Dato' Seri Ahmad Husni Mohamad Hanadzlah (PW56) who had also testified and described the accused's management style on matters related to 1MDB and SRC as 'autocratic' and the accused had even asked that PW56 not interfere in 1MDB and SRC matters. On 29 August 2011, the loan of RM2 billion was released by KWAP to SRC in four separate tranches of RM500,000,000 each.

[52] The prosecution highlighted further that on 13 March 2012, SRC wrote another letter to KWAP (P383) to apply for an additional financing from KWAP also in the sum of RM2 billion. This was again approved by the investment panel of KWAP with the same condition that SRC must obtain a guarantee from the government to secure the financing. This again SRC was able to do. Not only that. The Cabinet or MJM papers for approval of the second government guarantee for the second loan was tabled by the accused at the Cabinet meeting on 8 February 2012, which was even prior to the request made by SRC to KWAP for the additional financing in that letter of 13 March 2012 (P383). Following Cabinet's approval, the accused himself later executed the second guarantee on behalf of the government.

[53] It is also the case of the prosecution that for this second financing, prior to the formalisation of the government guarantee, PW43 on behalf of MOF wrote a letter dated 28 March 2012 (P397) to KWAP suggesting the release of the RM2 billion by the latter before the government guarantee was released to KWAP by the MOF. He agreed this was not normal practice and attributed the letter to an instruction by Tan Sri Wan Aziz (PW45), who as the Secretary General of the MOF was also the Chairman of KWAP and its investment panel as well, who in turn testified that the said letter from MOF to KWAP was as a result of a request made by the accused.

[54] The second RM2 billion was then released to SRC on the same day of that letter from MOF (P397) on 28 March 2012 in a single draw down payment of RM2 billion. The government guarantee was issued later but the date of its signing was backdated to 27 March 2012 to coincide with the date of the facility agreement between KWAP and SRC.

[55] The prosecution submitted that all these actions taken by the accused demonstrates his 'hands-on' approach to the two financings by KWAP to SRC.

The outward transfers of funds from SRC which flowed into the accounts of the accused

[56] SRC had thus received RM4 billion in total from KWAP, in a form of the two financing facilities. Evidence relevant to the charges in this case shows that various transactions had taken place involving the outward transfers of funds from the bank accounts of SRC.

[57] In particular, there were three transfers of funds of SRC which were channelled into the bank accounts of the accused. It is the case of the prosecution that the accused caused the transfers of the RM42m from SRC to his personal bank accounts.

[58] First, on 24 December 2014, Am-Islamic Bank via an email received a scanned copy of a written instruction which appeared to have been signed by Nik Faisal and Dato' Suboh Yassin, who were directors and signatories of SRC. The instruction was for the transfer of RM40m from SRC's current account No 2112022010650 ('Account 650') into the current account of Gandingan Mentari Sdn Bhd ('GMSB')'s account No 888100380694 which was also maintained at the same bank. GMSB is a wholly owned subsidiary of SRC.

[59] And on the very same date of 24 December 2014,GMSB on the authority of the same two signatories as in SRC wrote a transfer instruction to Am-Islamic Bank signed by them (as the two were also signatories of GMSB)

to effect the transfer of the same amount of RM40m into the current account of Ihsan Perdana Sdn Bhd ('IPSB') No 106810001108 maintained at Affin Bank Bhd.

[60] It is a key thrust of the prosecution's case that two days later, on 26 December 2014, of the RM40m received from GMSB, a sum of RM27m was transferred out of IPSB's account into the accused's current account No 2112022011880 ('Account 880') which was specified as 'AmPrivate-1MY' account in Am-Islamic Bank.

[61] Secondly, on the same date, IPSB made another transfer of RM5m out of its same Affin Bank account to be credited into another current account of the accused, also maintained at Am-Islamic Bank, but bearing the account No 2112022011906 ('Account 906'), and known as 'AmPrivate-MY' account.

[62] Thirdly, on 5 and 6 February 2015, two instruction letters signed by the same two signatories of SRC were issued to Am-Islamic Bank, and these asked that the transfers of a sum of RM10m in two tranches of RM5m each to GMSB, only for the RM10m to be thereafter transferred by GMSB into that IPSB's account maintained at Affin Bank.

[63] Then on 10 February 2015, IPSB effected a transfer of RM10m into the accused's Account 880. But on the same day, Nik Faisal, who was lawfully appointed as the mandate holder of the accused's bank accounts on terms and conditions imposed by the bank issued an instruction letter to Am-Islamic Bank for that RM10m received from IPSB to instead be now transferred from the accused's Account 880 to the accused's Account 906.

[64] Thus, for the seven charges it seems clear, as submitted by the prosecution that at the close of business on 10 February 2015, some RM42m which belonged to SRC was credited into the personal accounts of the accused. It should also be mentioned that testimonies of witnesses reveal that the significant bulk of the RM4 billion drawn down to SRC by KWAP was almost immediately upon receipt transferred to accounts outside the country and which now appeared to have been frozen by the relevant authorities in Switzerland. Its present status is not made clear in this trial.

The uses and transfers out of the SRC funds from the accused's accounts

[65] As part of the transfers relevant to the charges that had taken place during the material period, a significant transaction raised by the prosecution concerns the instructions made by the accused himself by way of an instruction letter to Am-Islamic Bank signed by the accused dated 24 December 2014 (exh P277). As the account holder, the accused instructed that RM27m be

transferred from his Account 880 to the account of Permai Binaraya Sdn Bhd ('PBSB') and another transfer of RM5m be made from his Account 906 to the account of Putra Perdana Construction Sdn Bhd ('PPC'). These were executed on 29 December 2014. Both are subsidiaries of Putrajaya Perdana Bhd ('PPB').

[66] Another aspect of outward transfers from the accounts of the accused would be the 15 personal cheques issued by the accused himself between the period of late December 2014 and February 2015. Specifically, one was in respect of his Am-Islamic Bank account No 2112022011898 ('Account 898') or also known as the 'AmPrivate-Y1MY' account and the remaining 14 personal cheques were from his Account 906 where the payees or recipients in relation to these 14 cheques have all testified in court and confirmed receipt of the specified sums from the accused.

Financial standing of SRC — Inability to repay, short-term loan granted to SRC to avoid declaration by KWAP of event of default

[67] The prosecution asserted that evidence show that sometime in 2015 it became clear that SRC was not be able to repay the interest due to KWAP on the two loans totaling RM 4 billion. MOF was informed by way of a letter issued by KWAP dated 28 August 2015 (P549) that if SRC defaulted in its repayment, an event of default would be declared.

[68] As the financing of the RM4 billion were guaranteed by the government, if a default notice was issued by KWAP, the whole sum of RM4 billion would have to be recalled and the government would be liable to pay up the entire loan and interest. To avoid being burdened by the huge recalled sum of RM4 billion having to be paid to KWAP in one lump sum within 30 days, the government via MOF decided to approve a short term loan to SRC, sufficient to repay the interest due to KWAP.

[69] Thus in 2015, the first short term loan of about RM100m was tabled and approved by the Cabinet at its meeting on 13 November 2015 and MOF disbursed the loan directly to KWAP as repayment for amounts due to KWAP. Regardless, SRC continued to default in its instalment repayments which forced MOF to extend to SRC a second short term loan of RM250m in 2016; and for the same reason yet a further third short term loan of RM300m in 2017.

[70] The prosecution maintained that the second and third short term loans totaling approximately RM550m were agreed and sanctioned by the accused himself in order to prevent KWAP from triggering an event of default, which would have caused the Government of Malaysia, as the guarantor for both the government guarantees, to repay the RM4 billion loans and interests in full.

The accused, so the prosecution argued, had therefore played a pivotal part in the payment out of approximately RM550m from the consolidated fund to service the interest payable on the RM4 billion previously borrowed by SRC from KWAP.

The crux of the charges

[71] The prosecution therefore submitted, in essence, that the accused, as a public officer, namely as the Prime Minister and Finance Minister had used his office for gratification of RM42m by involving himself in the decision of the Government of Malaysia at the Cabinet meetings on 17 August 2011 and 8 February 2012 to provide SRC with government guarantees to secure the financings of RM4 billion extended by KWAP to SRC. This is the first charge, and it is under s 23 of the MACC Act.

[72] The case of the prosecution on the CBT charges, three in total is that the accused as agent of SRC, namely as the Prime Minister, Finance Minister and advisor emeritus of the company was entrusted with dominion over properties belonging to SRC, and that in that capacity had committed criminal breach of trust of a total of RM42m thereof, in violation of s 409 of the Penal Code.

[73] In respect of the three money laundering charges under s 4(1)(b) of the AMLATFPUAA, it is alleged that the accused had committed money laundering by receiving a total of RM42m, which was the proceeds of unlawful activity, into his personal bank accounts.

KEY CONTENTIONS OF THE DEFENCE

[74] In the written submissions of the accused and during the clarification session, the position of the accused is that the prosecution has not proved a prima facie case in respect of any of the seven charges. The specific arguments of the defence will be dealt with in the discussions in the relevant parts throughout this judgment, and may be summarised in the following fashion.

The contentions of the defence in respect of the charge of the use of office for gratification

[75] In relation to the charge for the use of office for gratification under s 23 of the MACC Act, the principal arguments advanced by the defence may be stated as follows:

(a) the evidence relating to the involvement of the accused in the events between 2010 and 2012, leading up to and including the Cabinet's decisions to grant the government guarantees to SRC, and KWAP

A extending the total of RM4 billion to SRC does not establish the existence of a corrupt arrangement which the accused can be said to be party to;

(b) the evidence does not establish any nexus between the accused's participation in matters connected with the said decisions of the Cabinet to grant the government guarantees to SRC in the 2011 and 2012 and the RM42m that was transferred into his personal bank accounts in late 2014 and early 2015;

(c) the evidence leads to reasonable inferences that the transactions involving the RM42m were carried out without the knowledge and involvement of the accused and the impetus and purpose was unconnected to any act by him;

(d) the evidence also leads to a reasonable inference that the transactions involving the RM42m were done at the behest of others for their own ulterior purpose and benefit;

(e) the conclusion therefore is that the RM42m cannot be said to amount to 'gratification' as consideration for a use of office of position by the accused;

(f) the presumption under s 23(2) of the MACC Act does not apply because it has not been established that the accused had an 'interest' in SRC within the ambit of the mischief of the s 23 of the MACC Act offence. Even if the presumption applies, the evidence adduced has sufficiently rebutted the same;

(g) s 23(4) of the MACC Act applies since the Prime Minister and the Finance Minister's participation in decisions taken in relation to MOF Inc-owned companies such as SRC are done as representatives of the government and in the best interest of the government. As such, s 23(1) of the MACC Act is of no application to such acts; and

(h) the presumption under s 50 of the MACC Act is of no application given that the necessary pre-condition of proving 'gratification' in the context of a corrupt arrangement has not been met, or that alternatively, the said presumption has been rebutted because the purpose of the RM42m was other than as a corrupt gratification connected to the Cabinet's decisions as referred to in the charge.

The contentions of the defence in respect of the three CBT charges

[76] As for the three CBT charges, the summary of the many arguments of the defence vis a vis the various ingredients of the offence is as follows:

Ingredient of 'Agency' not established

(a) the capacities alleged in the three CBT charges (as the Prime Minister, Finance Minister and advisor emeritus) all do not fall within the definition of 'agent' as none of these were sub-servient capacities to SRC, whereby acts are done 'for and on behalf of' SRC qua principal;

(b) the contemporaneous documents relating to corporate governance regime of SRC do not reflect that any of these capacities fit within the traditional or purposive construction of an 'agent' for the purposes of Section 409 of the Penal Code;

(c) there was no role played in the operational affairs of SRC by the Finance Minister as a person. The acts of MOF Inc or *Menteri Kewangan Diperbadankan* (MKD) as a corporation sole are separate and distinct from those of the Finance Minister. The acts of MOF Inc. therefore are not the acts of the Finance Minister;

(d) further, in any event, the acts of MOF Inc are in the capacity of a shareholder of SRC. Shareholders are not agents of a company and owe no fiduciary duties to the company;

Ingredient of 'Entrustment/dominion' not established

(e) the corporate governance regime as reflected in the contemporaneous evidence including the M&A of SRC, the various directors' circular resolutions, the minutes of the SRC board meetings, the MOF Inc resolutions and the evidence of PW39 and PW42 establish that the board of directors was exclusively entrusted with dominion over the affairs and funds of SRC. The evidence also establishes that the directors did not act blindly in accordance with the instructions of either the Prime Minister, advisor emeritus, MOF Inc or the Finance Minister. At all material times the board of directors was completely aware of and did in fact act in accordance with their absolute decision-making power;

(f) the evidence does not establish that the Prime Minister, advisor emeritus or the Finance Minister was entrusted with dominion over funds of SRC whether directly or indirectly;

(g) the testimony of PW39 and PW42 was inconsistent with the contemporaneous documentary evidence, particularly in relation to the exaggerated role of the advisor emeritus and MOF Inc. which did not stand up to scrutiny in cross-examination and in fact did not fit with the evidence as a whole;

(h) sound legal reasoning also outlines that where supervision is given to a public officer over the affairs of a government linked company, no case of entrustment or dominion can be made out;

(i) the evidence fell short of establishing that the RM42 million depicted in the CBT charges were indeed funds belonging to SRC. In any event the evidence did not establish any specific entrustment or dominion over the RM42 million by the Prime Minister, advisor emeritus or Finance Minister;

Ingredient of 'misappropriation' not established

(j) the prosecution's attempted case on misappropriation is demolished as the evidence reveals that the funds of SRC were in fact disbursed out by 16 scanned copies of instruction letters which were not executed by PW42 who eventually denied knowledge of any financial transactions of SRC and GMSB;

(k) PW42's evidence on the purported appointment of IPSB as a CSR partner based on directions of the CEO was a fabrication as Nik Faisal was no longer the CEO of SRC at the material time (September 2014) and this was in fact known to all directors of SRC including PW39 who attended the relevant SRC board meetings where the board censured Nik Faisal for lying to the board on the status of the audited financial statements of the company for the financial year ended 2013.

(l) PW49's testimony was incredible in light of contemporaneous conversations recorded in BBM messages (P578) and PW54's admissions thereon. Her excuses for not having kept what would have been critical evidence which would have protected her were incredulous given her qualifications and experience;

(m) there was a material gap in the prosecution's case as emails which would have shed light on how the funds in SRC's account were caused to be transferred out were not investigated despite the same being in possession of the MACC;

(n) no case of misappropriation under Section 409 can be made out if the instruments by which funds in SRC's accounts were disbursed were forged or in any event unauthorized for being inconsistent with the applicable banking mandates;

(o) as admitted by the investigating officer there were other inferences on probable causes of the transactions of funds from SRC accounts. The evidence supported inferences that the same were caused by Jho Low and his cohorts as he ultimately benefitted from the disbursement of over RM290 million from the SRC account;

Element of 'dishonesty' not established

(p) the evidence supports an inference that the accused had no knowledge of the impugned transactions of funds out of SRC or into his accounts at the material time; and

(q) the evidence as a whole supports the inference therefore that the accused did not act dishonestly with regards to the transactions in the CBT charges or the utilization of funds which were remitted into his personalaccounts in 2014 and 2015.

The contentions of the defence in respect of the three money laundering charges

[77] In respect of its opposition to the three money laundering charges, the principal submissions of the defence, in summary, are as follows:

(a) the commission of the predicate offence has not been proven as the

factum of 'unlawful activity' — the s 23 of the MACC Act charge and the three CBT charges for the purposes of the money laundering charges cannot be established;

(b) as such, the RM42m that is specified in the money laundering charges therefore cannot be proven to be the 'proceeds' derived or obtained directly or indirectly from the predicate offences that make up the unlawful activities;

(c) the mere fact that the RM42m was transacted into Accounts 880 and 906 does not prove the commission of the offence in the money laundering charges;

(d) the effect of a failure to prove the factum of 'unlawful activity' means that the mental element or mens rea element of the money laundering charges need not be considered and in any event has not been established; and

(e) the criteria in s 4(2) of the AMLATFPUAA have no application as the predicate offence is one which the accused is alleged to have solely committed and that the 'proceeds' thereof are alleged to be laundered by the accused himself. The failure to prove the 'unlawful activity' itself negates the mens rea element.

STRUCTURE OF JUDGMENT

[78] The three different groups of charges will be considered in turn. The case for the prosecution and the many and various arguments of the defence will be considered, albeit not necessarily in the order they are listed above, in my assessment of the evidence to determine whether the ingredients of the offences framed in the seven charges have been established. Some aspects of the evidence may be relevant to all the three groups of charges, given that, as an example, the reference to the RM42m is made in all the three offences specified in the charges. Further, where more pertinent to the context, some of the more contentious and substantive issues will be separately dealt with.

ANALYSIS AND FINDINGS OF THIS COURT AT THE END OF THE PROSECUTION CASE

Maximum evaluation and prima facie

[79] The duty of this court at the end of the prosecution case is stipulated in s 180 of the Criminal Procedure Code ('the CPC'). The court must consider whether the prosecution has made out a prima facie case against the accused. It reads thus:

180 Procedure after conclusion of case for prosecution

(1) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a prima facie case against the accused.

(2) If the Court finds that the prosecution has not made out a prima facie case against the accused, the Court shall record an order of acquittal.

(3) If the Court finds that a prima facie case has been made out against the accused on the offence charged the Court shall call upon the accused to enter on his defence.

(4) For the purpose of this section, a prima facie case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.

[80] The law on this is well-entrenched. But it is so fundamental in governing the process of criminal prosecution that it would be remiss of me not to allude, albeit only briefly, to only two leading case law authorities on this subject. The first is the elucidation on the meaning of prima facie, as expressed in unmistakable and clear terms by the Federal Court in *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85, as follows:

> A prima facie case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can only be overthrown by evidence in rebuttal ... The result is that the force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen. On the other hand if a prima facie case has not been made out it means that there is no material evidence which can be believed in the sense as described earlier. In order to make a finding either way the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established. As the trial is without a jury it is only with such a positive evaluation can the court make a determination for the purpose of s 180(2) and (3). Of course in a jury trial where the evaluation is hypothetical the question to be asked would be whether on the evidence as it stands the accused could (and not must) lawfully be convicted. That is so because a determination on facts is a matter for ultimate decision by the jury at the end of the trial. Since the court, in ruling that a prima facie case has been made out, must be satisfied that the evidence adduced can be overthrown only by evidence in rebuttal it follows that if it is not rebutted it must prevail. Thus if the accused elects to remain silent he must be convicted. The test at the close of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a prima facie case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case for the prosecution. If there is any such doubt there can be no prima facie case.

[81] In another Federal Court decision, in *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457 it was also instructively held as follows: A

> 8. For the guidance of the courts below, we summarise as follows the steps that should be taken by a trial court at the close of the prosecution's case: B
>
> (i) the close of the prosecution's case, subject the evidence led by the prosecution in its totality to a maximum evaluation. Carefully scrutinise the credibility of each of the prosecution's witnesses. Take into account all reasonable inferences that may be drawn from that evidence. If the evidence admits of two or more inferences, then draw the inference that is most favourable to the accused; C
>
> (ii) ask yourself the question: If I now call upon the accused to make his defence and he elects to remain silent am I prepared to convict him on the evidence now before me? If the answer to that question is 'Yes', then a prima facie case has been made out and the defence should be called. If the answer is 'No' then, a prima facie case has not been made out and the accused should be acquitted; D
>
> (iii) after the defence is called, the accused elects to remain silent, then convict;
>
> (iv) after defence is called, the accused elects to give evidence, then go through the steps set out in *Mat v Public Prosecutor* [1963] MLJ 263; [1963] 1 LNS 82. E

[82] As such, this court must at this stage — being the close of the prosecution case — subject the totality of the evidence of the prosecution to maximum evaluation, which includes examining the credibility of the testimony of all the witnesses for the prosecution, and that if more than one inference arises as a result of this evaluation, the one favourable to the accused must be preferred. The court must then determine the all-important question that is whether the evidence are sufficient to convict the accused if he elects to remain silent. F G

[83] In order for the prosecution to make out a prima facie case of the MACC charge, the CBT charges and the money-laundering charges, it is necessary for the prosecution to prove the ingredients of each of the offences as enacted by the respective statutes. I will deal with these crucial issues next. H

The charge under s 23 of the MACC Act — Use of position for gratification I

The charge

[84] The accused is faced with a single charge, as amended, for an offence under s 23(1) of the MACC Act which reads as follows:

Bahawa kamuan tara 17 Ogos 2011 dan 8 Februari 2012, di Pejabat Perdana Menteri, Presint 1, Putrajaya, di dalam Wilayah Persekutuan Putrajaya, sebagai seorang pegawai badan awam,iaitu Perdana Menteri dan Menteri Kewangan Malaysia, telah menggunakan jawatan untuk suapan bagi diri kamu berjumlah empat puluh dua juta Ringgit Malaysia (RM42,000,000.00) apabila kamu telah terlibat dalam keputusan bagi pihak kerajaan Malaysia untuk memberikan jaminan kerajaan bagi pinjaman-pinjaman berjumlah empat billion Ringgit Malaysia (RM4,000,000,000.00) daripada Kumpulan Wang Persaraan (Diperbadankan) kepada SRC International Sdn Bhd, oleh yang demikian kamu telah melakukan kesalahan di bawah Seksyen23 Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 [Akta 694] yang boleh dihukum di bawah Seksyen 24 Akta yang sama.

The law

[85] Section 23 provides quite simply, as follows:

Offence of using office or position for gratification

(1) Any officer of a public body who uses his office or position for any gratification, whether for himself, his relative or associate, commits an offence.

(2) For the purposes of subsection (1), an officer of a public body shall be presumed, until the contrary is proved, to use his office or position for any gratification, whether for himself, his relative or associate, when he makes any decision, or takes any action, in relation to any matter in which such officer, or any relative or associate of his, has an interest, whether directly or indirectly.

(3) For the avoidance of doubt, it is declared that, for the purposes of subsection (1), any member of the administration of a state shall be deemed to use his office or position for gratification when he acts contrary to subsection 2(8) of the Eighth Schedule to the Federal Constitution or the equivalent provision in the constitution or Laws of the Constitution of that State.

(4) This section shall not apply to an officer who holds office in a public body as a representative of another public body which has the control or partial control over the first-mentioned public body in respect of any matter or thing done in his capacity as such representative for the interest or advantage of that other public body.

[86] The penalty upon a conviction for an offence under s 23 is stated in s 24, the relevant parts of which read as follows:

24 Penalty for offences under sections 16, 17, 18, 20, 21, 22 and 23

(1) Any person who commits an offence under sections 16, 17, 20, 21, 22 and 23 shall on conviction be liable to —

(a) imprisonment for a term not exceeding twenty years; and

(b) a fine of not less than five times the sum or value of the gratification which is the subject matter of the offence, where such gratification is capable of being valued or is of a pecuniary nature, or ten thousand ringgit, whichever is the higher.

...

[87] The charge specifies that the accused had at the Prime Minister's Office in Putrajaya, between 17 August 2011 and 8 February 2012 used his position as the Prime Minister of Malaysia as well as the Finance Minister for gratification of RM42m to himself, by his involvement in the decision of the government to provide guarantees for the financing of RM4 billion made available by KWAP to SRC.

[88] The two main elements that must be proved for an offence under this s 23 of the MACC Act given the charge as framed are first, the accused was an officer of a public body, and secondly the accused had used his position for gratification for himself.

Analysis of the first element — Officer of a public body

[89] The starting point is s 3 of the MACC Act which defines 'an officer of a public body' as follows:

'officer of a public body' means any person who is a member, an officer, an employee or a servant of a public body, and includes a member of the administration, a member of Parliament, a member of a State Legislative Assembly, a judge of the High Court, Court of Appeal or Federal Court, and any person receiving any remuneration from public funds, and, where the public body is a corporation sole, includes the person who is incorporated as such.

[90] It is readily plain that the term 'officer of a public body' includes, among others, a member of the administration, a Member of Parliament and any person receiving any remuneration from public funds.

[91] Based on evidence, the accused was all three.

Whether the accused was a member of the administration

[92] First, art 160 of the Federal Constitution defines a member of the administration as follows:

160 Interpretation

(1) The Interpretation and General Clauses Ordinance 1948 (M.U. 7/48), as in force immediately before Merdeka Day shall, to the extent specified in the Eleventh Schedule, apply for the interpretation of this Constitution as

A it applies for the interpretation of any written law within the meaning of that Ordinance, but with the substitution of references to the Yang di-Pertuan Agong for references to the High Commissioner.

(2) In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say —

B ...

'Member of the administration' means, in relation to the Federation, a person holding office as Minister, Deputy Minister, Parliamentary Secretary or Political Secretary and, in relation to a State, a person holding a corresponding office in the State or holding office as member (other than an official member) of the Executive Council;

C ...

[93] A Minister is thus a member of the administration. The accused was at the material time the Finance Minister. He was therefore an officer of a public D body.

[94] In addition, the Interpretation and General Clauses Ordinance 1948 referred to in art 160(1) of the Federal Constitution, and which now exists as E Part II of the Interpretation Acts 1948 and 1967 defines in s 66 a Minister as follows:

66 Definitions

In PART II of this Act, and in every written law as hereinafter defined, and in all F public documents enacted, made or issued before or after 31st January 1948 the following words and expressions shall, as from that date and without prejudice to anything done prior thereto, have the meanings hereby assigned to them respectively, unless there is something in the subject or context inconsistent with such construction or unless it is therein otherwise expressly provided —

G ...

'Minister' means a Minister appointed by the Yang di-Pertuan Agong under Article 43 of the Constitution; and any reference in any provision of any written law to a Minister means the Minister for the time being charged with the responsibility for the matters which such provision relates;

H ...

[95] The expression Minister must include the Prime Minister. This is because art 43 of the Federal Constitution provides for the appointment of a I Prime Minister in the formation of the Federal Cabinet of Ministers by the Yang di-Pertuan Agong ('the King'). The Prime Minister advises the King on the appointment of Ministers and leads by presiding over the Cabinet. For present purposes the relevant parts of art 43 read as follows:

43 Cabinet

(1) The Yang di-Pertuan Agong shall appoint a Jemaah Menteri (Cabinet of Ministers) to advise him on the exercise of his functions.

(2) The Cabinet shall be appointed as follows, that is to say:

(a) the Yang di-Pertuan Agong shall first appoint as Perdana Menteri (Prime Minister) to preside over the Cabinet a member of the House of Representatives who in his judgement is likely to command the confidence of the majority of the members of that house; and

(b) he shall on the advice of the Prime Minister appoint other Menteri (Ministers) from among the members of either House of Parliament; ...

[96] This court is also mindful that under s 57(1)(h) of the Evidence Act 1950, the courts must take judicial notice of the accession to office for the time being any public office in any part of Malaysia, if the fact of the appointment to such office is notified in the *gazette* or in any *state gazette*. The appointment of the accused to the offices of the Prime Minister and the Finance Minister was published in the *gazette* vide PU(A) 222/2009.

[97] The prosecution has also called a witness, Daman Huri bin Nor (PW25), the *Setiausaha Bahagian, Bahagian Kabinet, Jabatan Perdana Menteri,* or the head of Cabinet division at the Prime Minister Department, who produced the two letters of appointment by the Yang di-Pertuan Agong (the King) (P349 and P350) appointing the accused as Prime Minister pursuant to art 43(2)(a) of the Federal Constitution. He was technically appointed as the Prime Minister of Malaysia twice, first on 3 April 2009 upon succeeding the fifth Prime Minister, and for a second time on 6 May 2013, after the 13th General Elections.

[98] The prosecution also tendered through PW25 a letter dated 31 January 2019 on a certificate of position held by the accused (P348) pursuant to s 55 of the MACC Act which reads as follows:

55 Certificate of position or office held

(1) A certificate issued by a principal or an officer on behalf of his principal shall be admissible in evidence in any proceedings against any person for any offence under this Act as prima facie proof that the person named in such certificate —

(a) held the position, office or capacity as specified in such certificate and for such period as so specified; and

(b) received the emoluments as specified in such certificate.

(2) A certificate issued under subsection (1) shall be prima facie proof that it was issued by the person purporting to issue it as principal or on behalf of

A the principal without proof of the signature of the person who issued such certificate and without proof of the authority of such person to issue it.

B **[99]** The certificate which confirms the position of the accused as the Prime Minister and the Finance Minister at the material time, having been issued by PW25, then the *Setiausaha Bahagian Hal Ehwal Perlembagaan dan Parlimen* at the Prime Minister's Department, is thus prima facie proof of the fact that the accused did indeed occupy those positions.

C Whether the accused was a Member of Parliament

[100] Secondly, the accused was as known to most, also a Member of Parliament at the material time. This was confirmed by Farah Nurdiana Azhar (PW26), an administrative officer for parliamentary affairs, who testified as to
D the allowances that were paid by Parliament to the accused when he was a Member of Parliament, as shown in the pay slips of the accused in P351A–D and P352A–D which recorded the allowances paid into his bank account at Affin Bank. PW26 further stated that the accused's monthly income as a Member of Parliament and allowances as head of Dewan Rakyat (being the
E Prime Minister) amounted to RM19,846.59. As stated earlier, a Member of Parliament is an officer of a public body under s 3 of the MACC Act.

Whether the accused received remuneration from public funds

F **[101]** Thirdly, there is the evidence that the accused received remuneration from public funds. The *Timbalan Ketua Akauntan Pengurusan, Bahagian Akaun, Jabatan Perdana Menteri,* or Deputy Chief Management Accountant in the Prime Minister's Department, Zarina bt Yusuf (PW27), testified that the accused's last known monthly salary for his service as a member of the
G administration, namely as the Prime Minister and the Finance Minister in April 2018 was RM58,605.15 as recorded in the pay slip (P354).

[102] As such the accused's last drawn salary for the month of April 2018, just before the 14th General Elections, was RM78,451.74. Unmistakably
H therefore, it has been demonstrated that the accused had received remuneration from public funds.

[103] Accordingly, the prosecution has proven the first element of the charge under s 23 of the MACC Act against the accused, in that the accused was at the
I material time an officer of a public body within the meaning ascribed to it under s 3 of the MACC Act, by virtue of the fact that he was not only a member of the administration, but also a Member of Parliament, as well as a person receiving remuneration from public funds, when any one of the three will have already fulfilled the definition of an officer of a public body.

[104] For the record, in fact the defence also does not challenge this position and accepts that the accused was an officer of a public body at the material time, as confirmed by defence during oral submission at the end of the prosecution case on 23 October 2019 in open court.

[105] As such it is clear that the first element of the offence under s 23 of the MACC Act that is the accused being an officer in a public body has been established.

Second element — Use of position for gratification

[106] The second element of s 23 that must be established is that the accused had used his position for gratification whether for himself, his relatives or associates.

The presumption of using office for gratification

[107] In seeking to prove this element, which is the essence of the proscription under s 23(1), the prosecution relies on s 23(2) of the MACC Act. This provides for a rebuttable statutory presumption in that an accused is presumed to use his position for gratification when he makes any decision or takes any action in relation to any matter in which he has an interest, whether directly or indirectly.

[108] It reads, again, as follows:

> 23 Offence of using office or position for gratification
>
> ...
>
> (2) For the purposes of subsection (1), an officer of a public body shall be presumed, until the contrary is proved, to use his office or position for any gratification, whether for himself, his relative or associate, when he makes any decision, or takes any action, in relation to any matter in which such officer, or any relative or associate of his, has an interest, whether directly or indirectly.

[109] As such, in this case, the presumption of the accused having used his position for gratification will become applicable if the prosecution can show that the accused had made any decision or taken any action in respect of any matter in which the accused had an interest.

[110] For emphasis, there are therefore two related aspects to this presumption. The first is on whether there were decisions or actions taken by the accused and the second is whether any such decisions or actions concerned a matter the accused had an interest in.

The presumption — The action and decision of the accused

[111] The contention of the prosecution is that the accused was involved in the decisions taken at the Cabinet meetings to issue the two government guarantees for the loans granted by KWAP to SRC, in which the accused is said to have an interest.

[112] Evidence, as recorded in the minutes of those Cabinet meetings and as testified by Tan Sri Mazidah Abdul Majid (PW40), who was at the material time the Deputy Head Secretary (Cabinet) in the Prime Minister's Department, showsthat the accused was present in and in fact as the Prime Minister chaired the two meetings of the Cabinet held on 17 August 2011 and 8 February 2012 which had approved the government guarantees. PW40 was present at both Cabinet meetings. The period between these two dates is specified in the charge against the accused.

[113] Such presence and involvement at a meeting which resulted in a decision on a matter carries significant implications under the law. Presence is sufficient to be construed as one having made any decision or taken any decision at the meeting. It satisfies the element of 'using' office or position for gratification.

[114] This position was well-enunciated in a High Court decision of *Public Prosecutor v Dato Haji Mohamed Muslim bin Haji Othman* [1983] 1 MLJ 245. This case concerns a charge under s 2(1) of the Emergency (Essential Powers) Ordinance No 22 of 1970 which is not dissimilar in substance to the instant s 23 of the MACC Act, where Hashim Yeop A Sani J (as he then was) instructively made the following important observation:

> The next question which follows is whether the physical presence of the accused at the EXCO meeting which passed the application was sufficient in the circumstances for him to be regarded in law to have used his public position or office for his pecuniary or other advantage. In my view, the answer is in the affirmative. If the EXCO meeting on October 4, 1975 were to be regarded as a play his silence did not make the accused any less an actor in the play.
>
> The minutes of the meeting of the EXCO on October 4, 1975 (exh P19) clearly show that he was one of the members constituting the Executive Council for that particular meeting. The minutes also show that the Executive Council so constituted made the decision to approve the application. The minutes were subsequently confirmed (exh P20) and there is no evidence to show that the accused had at any time asked to be excluded from the minutes or from the decision so recorded.
>
> A number of witnesses both prosecution and defence said that they took no objection to the presence of the accused. In my view the fact that no one took objection to the presence of the accused at that meeting does not alter the position

in law. Nor the fact that according to some witnesses his presence would have made no difference whatsoever and that the application would have been approved any way.

Now the question of mens rea. I need only say that mens rea is necessary in every criminal offence save those which the Legislature thought fit to expressly exclude. But mens rea can be proved in diverse ways. Here mens rea is proved if the accused knew or ought to have known of the conflict between his public duty as member of the EXCO and his private interest in the approval of the application.

...

The aim of Ordinance 22 is to bring to book renegade politicians and public servants who abuse their public positions for private gains. I agree that there are extenuating circumstances in this case. It is true that the accused was among those eligible to apply and to be given State land from the area earmarked for alienation to the three categories of people mentioned earlier in the judgment. I also agree that unlike in *Haji Abdul Ghani bin Ishak* the accused in this case was silent when the Chairman tabled his application for the land which proceeding could not have taken more than a couple of minutes before the decision to approve was made by the EXCO. But an offence has nevertheless been committed. On the facts I can come to no other conclusion but that the accused took part in making the decision which benefited him personally and that in essence is the very thing which Ordinance 22 prohibits.

[115] Similarly, in the instant case before me, the minutes of the Cabinet meetings subsequent to those two respective meetings had duly confirmed the same, with no amendments whatsoever. In fact the former Second Finance Minister (PW56) testified that at the meetings when the papers on the government guarantees were presented, both of which he attended, there were no discussion on them at all, on both occasions.

[116] For the first Cabinet meeting on 17 August 2011, the relevant memorandum (P537B) presented to the Cabinet dated 15 August 2011 was stated to be from the Prime Minister and tabled by Tan Sri Nor Mohamed Yakcop, Minister in the Prime Minister's Department, whilst for the Cabinet meeting on 8 February 2012, the memorandum dated 3 February 2012 (P527B) came from the Finance Minister and signed by the accused himself.

[117] The presence and involvement of the accused in the Cabinet meetings which approved the two guarantees for the financing from KWAP to SRC (without which KWAP would never have granted the two loans totalling RM4 billion to SRC) meant that the accused had made decisions and taken actions in the context of the first requirement for the presumption under s 23(2) of the MACC Act. As the Prime Minister, the accused in fact chaired the said meetings.

[118] PW40 also confirmed that the accused did not either declare he had any interest in the matter concerning the guarantees for the financing to SRC or withdraw from the discussion on the said agenda item at either of the two Cabinet meetings.

[119] The law is that even if an accused has declared his interest in a matter under consideration at a meeting, his failure to withdraw from and leave the meeting would still amount to his having used his position for gratification. The prosecution's reliance on the High Court decision in the case of *Public Prosecutor v Amir Dagang* [2009] 10 CLJ 448 is apposite. The charge in that case was under s 15 of the former Anti-Corruption Act 1997, which is now s 23 of the MACC Act.

[120] As submitted by the prosecution, in that case, the accused, who as the school headmaster was the most senior member in the approving committee known as *Jawatankuasa Kewangan*, went only so far as to declare his interest in the matter, but did not excuse himself and was physically present during the meeting to appoint a company jointly owned by him and his wife as the supplier of various goods and services.

[121] In reversing the verdict of the lower court and convicting the accused, the High Court stated:

> [28] The questions are posed: *How independently and freely the members of Jawatankuasa Kewangan could express their views in the presence of their superior?* How would the members of the Jawatankuasa Kewangan dare to overrule their superior who had expressly suggested the company to be appointed as the supplier and gave the reasons for its appointment, in his presence?
>
> ...
>
> [30] What are the implications to be drawn from the material facts referred to above? The offence under s 15 of the Act is very similar in nature to s 2(1) of the Emergency (Essential Powers) Ordinance No 22 of 1970, namely, using public position for pecuniary advantage. The intention of s 15(1) of the Act and s 2(1) of the Emergency (Essential Powers) Ordinance No 22 of 1970 is to ensure that the holders of public offices do not use their office for pecuniary gain or advantage. *It is therefore the duty of such officers to ensure that they are free of conflict of interest in the decision making process.* The principles pronounced in cases under s 2(1) of the Emergency (Essential Powers) Ordinance are therefore applicable to cases under s 15 of the Act. *It can be seen from the following authorities that to ensure an absence of conflict of interest, there must not only be a declaration of interest in the matter but also to disqualify oneself, which includes not to be physically present during the meeting.*
>
> ...

[43] With respect, I find the learned trial judge had failed to realise the eight charges expressly state that the respondent had used his public position for gratification by appointing the company belonging to him and his wife as supplier of the school. *The implication of the conduct in failing to disclose his own interest in the company is that the respondent knew or ought to have known of the conflict between his public duty as the principal of the school and his interest in the company as co-owner.*

...

[49] The accumulative effect of the above conducts clearly evinces the respondent's intention not to disqualify himself or to avoid conflict of interest. *In failing to divorce himself completely from the necessity of having to make the decision, it is sufficient in the circumstance to regard him in law to have used his public position for gratification.*

[50] In my judgment, even without the statutory presumption, the appellant had adduced ample credible evidence to show that the respondent had used his position as Headmaster of the school for gratification. Accordingly, the learned trial judge had erred by deciding that the appellant has failed to make out a prima facie case and that the respondent had rebutted the presumption on the balance of probability. (Emphasis added.)

[122] As such, when one is present in any meeting scheduled to consider any matter that places one in a conflict position, that is between his official or public position and his private interest, one is duty bound to declare his interest and withdraw and excuse himself from the deliberation of the relevant matter.

[123] Some legislation make this express. For example, the Companies Act 2016, specifically in s 222 states that subject to certain exceptions, a director of a company who is in any way, whether directly or indirectly, interested in a contract entered into or proposed to be entered into by the company shall not participate in any discussion while the contract or proposed contract is being considered during the meeting and shall not vote on the contract or proposed contract. A director who contravenes this section commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding five years or to a fine not exceeding RM3m or to both.

[124] The Financial Services Act 2013 in s 58 similarly provides that a director of a financial institution shall disclose to the board of directors of the institution the nature and extent of his interest, whether directly or indirectly, in a material transaction or material arrangement with the institution. Further, whether or not a declaration under sub-s (1) has been made, a director who has, directly or indirectly, an interest in a material transaction or material arrangement shall not be present at the board meeting where the material transaction or material arrangement is being deliberated by the board of directors.

[125] The definition of a director in both these statutes include a person in accordance with whose directions or instructions the majority of directors or officers of the body are accustomed to act. This is the formulation for a shadow director. In the discussion on the charges for criminal breach of trust, to be discussed below, I find that the accused was a director of SRC by virtue of being both a shadow director and a director under s 402A of the Penal Code.

[126] In addition, as testified by PW40, a member of the Cabinet is in fact under an obligation to leave a Cabinet meeting in matters which the member has an interest. This is stipulated in a document known as *Kod Etika Bagi Anggota-Anggota Pentadbiran* (D559 and D559A). This is the Code of Ethics applicable to members of the administration. Paragraph 4 therein states that the members of the administration must ensure that no conflict of interest arises by virtue of his position as the holder of a public office and his personal interest. Where there was such conflict, that member of the administration must not only declare his interest, but also leave the Cabinet meeting and his non-attendance recorded, to avoid any conflict of interest during the deliberation of the Cabinet, even where he is not involved in its deliberation.

[127] Paragraph 4 of the Code of Ethics also stipulates that the same procedure has to be adhered to where the member of the administration chairs the meeting. Similarly, at meetings to confirm the minutes which contains the decision in relation to his interest, he has to also declare his interest and leave the meeting.

[128] PW40 also testified that this requirement to avoid conflict of interest was adhered to previously and gave several instances where members of the Cabinet had declared their interest and left the meeting to avoid any possible conflict of interest, including the accused himself on a matter involving the financial institutions, at the time when his brother was the chief executive of an banking group.

[129] In this case, to reiterate, the accused did not declare his interest when the Cabinet considered the guarantee proposals concerning the financing by KWAP to SRC at its meetings. Neither did he leave the meeting when the Cabinet deliberated on the matter. He chaired both meetings. All others, being Ministers, were subordinate to the accused. In addition, the accused personally introduced and tabled the proposal on the second guarantee at the Cabinet meeting on 8 February 2012.

[130] These were plainly recorded in the respective minutes of the meetings, and duly confirmed in the subsequent minutes of meetings. The accused was clearly so firmly in a position of conflict of interest and deliberately failed to divorce himself from that invidious situation. His attendance alone, not to

mention his failure to leave the deliberation on the government guarantees is sufficient under the law to having used his public position for gratification under s 23 of the MACC Act.

Whether the accused had an interest in the matter on SRC

[131] The second requirement of s 23(2) which presence would give rise to the presumption of the use of position for gratification is that the actions or decisions concern a matter in which the accused has an interest. This is a crucial issue that requires determination. The absence of interest in the matter before the Cabinet would render the charge against the accused under s 23 of the MACC Act wholly unsustainable.

[132] The question therefore is whether the accused could be said to have an interest in SRC such that his involvement in the Cabinet meetings considering a proposal on the government extending a guarantee to the financing by KWAP to SRC gives rise to a conflict of interest situation to the accused.

[133] The defence argues that the Code of Ethics applicable to members of the administration emphasised on the need for members of the administration to ensure there is no conflict of interest between one's public office and his personal interest. This in my view is correct, as a general proposition.

[134] But the defence's more specific assertion is that the accused's position and involvement in relation to SRC is clearly *not* a form of a personal or private interest but instead professional in nature, arising from and attributable to his public office.

[135] There is therefore, according to the defence, no conflict of interest situation for the accused vis a vis the matters on the government guarantees for SRC presented at the two Cabinet meetings. The defence has also referred to a number of reported cases where the personal interest in contention was clearly private in nature and not related to any professional capacity of holding a public office.

[136] Whilst this contention by the defence is not unattractive, having examined the facts and evidence presented before this court, in my judgment the interest of the accused in SRC cannot be characterised as one that was entirely professional in the public office context. It was not just because the accused as the Prime Minister had control over the appointment of the directors of SRC under article 67 of its M&A or that as the Finance Minister he was as MOF Inc the sole shareholder of the company or that as its advisor emeritus matters of importance must be referred to him under article 117 of the M&A. It was more than that.

[137] I should mention that the word 'interest' in s 23 of the MACC Act is not defined in the legislation and is certainly not limited by what is contained in the Code of Ethics. The Code of Ethics itself does not state that its concept of interest is definitive or exhaustive.

[138] Furthermore I must also emphasise that the interest in vis a vis the subject matter referred to in s 23(2) is also stated to be directly or indirectly held.

[139] In my judgment because of his position as the Prime Minister and the Finance Minister of the country, the accused was able to endorse the establishment of SRC, which although stated to be a strategic natural resources development company for the country, was in truth designed to be and did become, for all intents and purposes, a vehicle utilised by the accused for his own private advantage, and importantly managed to secure for SRC the RM4 billion financing from KWAP and the government guarantees for the entire financing, all made possible by the accused's own overarching authority in SRC, as the Prime Minister with the power to appoint and dismiss the directors under the articles, and subsequently also as the sole shareholder of the company as MOF Inc and eventually also as the advisor emeritus of SRC, following the insertion of a provision into the articles with his consent. In other words, the accused had helped to establish SRC which he then used for his private interest.

[140] In my view the factual matrix concerning the involvement of the accused in SRC demonstrates the existence of an interest of a kind which is caught under s 23(2) of the MACC Act.

Evidence of the interest of the accused

[141] Evidence of this interest of the accused, premised on his control of the company, is found in the series of actions and course of conduct performed by him or at his behest which resulted in the approval by the Cabinet of the said two government guarantees. The same conduct which concerned SRC other than his participation in the Cabinet meetings could also be construed as actions taken by the accused on a matter in which he has an interest even though the charge confines the material period to be between 17 August 2011 and 8 February 2012. However such conduct and actions performed by the accused prior to 17 August 2011 or subsequent to 8 February 2012 would still be relevant to show the interest the accused had in SRC, and the extent thereof.

[142] Under s 8(2) of the Evidence Act 1950 the conduct of an accused antecedent or subsequent is relevant if such conduct influences or is influenced by any fact in issue or relevant fact.

[143] Section 8 of the Evidence Act 1950 reads as follows:

8 Motive, preparation and previous or subsequent conduct

(1) Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

(2) The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to that suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant if the conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

Explanation 1 — The word 'conduct' in this section does not include statements unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of this Act.

Explanation 2 — When the conduct of any person is relevant any statement made to him or in his presence and hearing which affects his conduct is relevant.

ILLUSTRATIONS

(a) A is tried for the murder of B.
The facts that A murdered C, that B knew that A had murdered C and that B had tried to extort money from A by threatening to make his knowledge public are relevant.

(b) A sues B upon a bond for the payment of money. B denies the making of the bond.
The fact that at the time when the bond was alleged to be made B required money for a particular purpose is relevant.

(c) A is tried for the murder of B by poison.
The fact that before the death of B, A procured poison similar to that which was administered to B is relevant.

(d) The question is whether a certain document is the will of A.
The facts that not long before the date of the alleged will A made inquiry into matters to which the provisions of the alleged will relate, that he consulted lawyers in reference to making the will and that he caused drafts of other wills to be prepared of which he did not approve are relevant.

(e) A is accused of a crime.
The facts that either before or at the time of or after the alleged crime A provided evidence which would tend to give to the facts of the case an appearance favourable to himself, or that he destroyed or concealed evidence or prevented the presence or procured the absence of persons who might have been witnesses or suborned persons to give false evidence respecting it are relevant.

(f) The question is whether A robbed B.
The facts that after B was robbed, C said in A's presence: 'The police are coming to look for the man who robbed B' and that immediately afterwards A ran away are relevant.

(g) The question is whether A owes B RM10,000.
The facts that A asked C to lend him money, and that D said to C in A's presence and hearing: 'I advise you not to trust A for he owes B RM10,000,' and that A went away without making any answer are relevant facts.

(h) The question is whether A committed a crime.
The fact that A absconded after receiving a letter warning him that inquiry was being made for the criminal and the contents of the letter are relevant.

(i) A is accused of a crime.
The facts that after the commission of the alleged crime he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it are relevant.

(j) The question is whether A was ravished.
The facts that shortly after the alleged rape she made a complaint relating to the crime, the circumstances under which and the terms in which the complaint was made are relevant.
The fact that without making a complaint she said that she had been ravished is not relevant as conduct under this section, though it may be relevant —

(i) as a dying declaration under section 32(1)(a); or

(ii) as corroborative evidence under section 157.

(k) The question is whether A was robbed.
The fact that soon after the alleged robbery he made a complaint relating to the offence, the circumstances under which and the terms in which the complaint was made are relevant.
The fact that he said he had been robbed without making any complaint is not relevant as conduct under this section, though it may be relevant —

(i) as a dying declaration under section 32(1)(a); or

(ii) as corroborative evidence under section 157.

[144] The evidence of involvement of or the series of actions taken by the accused in respect of SRC; its set up, financing, guarantee arrangement and ownership structure before and after the participation of the accused at the two Cabinet meetings which approved the government guarantees would fall within the scope of a number of the illustrations set out in the above-mentioned s 8 of the Evidence Act, and thus demonstrates that the accused held an interest beyond that of public office. This evidence includes among others, the following:

The position of EPU and accused's endorsement for the formation of SRC

[145] Even though the accused agreed with the recommendation of the EPU to only allow a RM20m launching grant to SRC instead of 1MDB's request for a RM3 billion grant, the accused did at the same time endorse the establishment of SRC, as reflected in the EPU memorandum dated 12 October 2010 (P357).

[146] Datuk Dr Kamariah Noruddin (PW28), a former deputy director-general (Macro) at the Economic Planning Unit (EPU) in the Prime Minister's Department testified that according to the proposal from 1MDB, SRC would be established as a strategic initiative to ensure the security of the country's energy supply. The EPU suggested in the memorandum (P357) that was endorsed by the accused that the proposal to set up SRC be limited to coal and uranium given the nation's high dependence on Tenaga Nasional Bhd — at about 80% — in view of the supply of coal, and since petroleum and natural gas were already taken care of by Petronas.

[147] PW28 who at the material time was the *Pengarah Sektor Tenaga* or the director of the energy sector of the EPU gave evidence that despite her initial assumption that the proposal from Datuk Shahrol Azral Ibrahim Halmi, then the CEO of 1MDB was a substantive one, given that it was submitted directly to the Prime Minister and Finance Minister by a company wholly owned by MOF Inc, the proposal for a grant of RM3 billion grant from the government was actually only contained in a three-page letter.

[148] PW28 stated that whilst the EPU was supportive of a new player in the energy sector for the extraction of coal and uranium, the EPU had proposed only to grant a launching grant of RM20m. The reason for this is manifest from PW28's further testimony that the requested amount of RM3 billion by 1MDB amounted to about 7% of the entire development for the country. She was firm is stating that in the absence of a huge development budget, it would have been negligent for the EPU to grant RM3 billion to a company that had not been formed and from which the return of investment had not been shown. This was against the context of the annual governmental allocation for development budget for the whole of Malaysia stood at RM42 billion. The witness thus emphasised that the proposed RM3 billion alone for SRC would have constituted some 7% of the entire development budget for the country.

[149] This, as confirmed by PW28, was contained in the memorandum dated 12 October 2010 (P357) signed off by the then EPU director-general, the late Datuk Noriyah Ahmad, which also bore the accused's handwritten notation dated 15 October 2010 agreeing with the proposals of the EPU.

[150] She also gave evidence that the application letter from 1MDB dated 24 August 2010 (P356) was not easy to process, and was unusual because EPU had to respond directly to the Prime Minister, when ordinarily proposals would be channelled through the pertinent ministries, even for government linked companies.

[151] Less than three months later, on 7 January 2011, SRC was incorporated. On the incorporation of SRC, Nik Faisal, then the chief investment officer of 1MDB was registered as one of its first two directors and one of its two subscriber shareholders.

[152] Even though 1MDB had not yet become the shareholder of SRC upon its incorporation, the articles of the association of SRC upon its incorporation already contained article 67 which conferred on the Prime Minister of the country or the accused in this trial the power to appoint and remove members of the board of directors of SRC.

Funding for SRC – The accused's notation to KWAP CEO, 'agreeing' with SRC's request of RM3.95 billion from KWAP

[153] More crucially, the accused responded to a letter from SRC to him as the Prime Minister and Finance Minister dated 3 June 2011 (P364) which requested for a clean loan of RM3.95 billion from KWAP with a notation or minute by the accused addressed directly to the CEO of KWAP stating in fact that the accused agreed with SRC's proposal. The accused wrote — 'Datuk Azian, bersetuju dengan cadangan ini'.

[154] It must be immediately said that this minute or notation specifically mentions the accused's agreement with the proposal. It is not a request for it to be evaluated, which was the case when 1MDB first asked for the RM3 billion grant to set up SRC. Then, the accused stated on the 1MDB letter (P356) a minute or notation to the Minister in the Prime Minister's Department (EPU) to only evaluate and provide commentary.

[155] The EPU memorandum (P357) stated that the funding of SRC should be obtained from financial institutions or raised from the capital markets. The following passage is contained in para 3(v) as follows:

> v. Permohonan geran daripada Kerajaan berjumlah RM3 bilion:
>
> Permohonan geran daripada Kerajaan berjumlah RM3 billion tidak disokong di mana secara prinsipnya sebarang pelaburan tidak seharusnya dibiayai daripada geran. Walau bagaimanapun bagi membolehkan kerja-kerja awal SRC dilaksanakan oleh 1MDB, dicadangkan peruntukan sebanyak RM20 juta disediakan sebagai *launching grant*. Bagi membiayai pelaburan SRC, opsyen lain seperti mendapatkan

pinjaman bank komersil, *joint venture* dengan syarikat swasta atau penerbitan bon boleh dipertimbangkan oleh 1MDB. Ini penting dalam memastikan wujudnya kesamarataan persaingan antara GLC dan sektor swasta tanpa layanan istimewa kepada GLC. Keserataan persaingan ini harus dipelihara bagi memastikan persaingan adil untuk semua pihak.

[156] This suggestion is in accord with PW28's testimony about the very sizeable request for a financial grant by 1MDB to set up SRC when compared to the national's development budget. In other words, the funding of SRC should not be sourced from public finance.

[157] But there is no evidence of SRC having sought financing from the banking sector, or by way of raising debt from the capital markets. Or it could well have attempted, but without success. The fact as it transpired, was that SRC instead approached *Kumpulan Wang Persaraan (Diperbadankan)* ('KWAP') (Retirement Fund (Incorporated)). And it did so through the accused, who was the Prime Minister and the Finance Minister.

[158] KWAP was established under the Retirement Fund Act 2007 (succeeding the repealed Pensions Trust Fund Act 1991). One of its key objectives is to manage the fund towards achieving optimum returns on its investments, to be applied towards assisting the federal government in financing its pension liability.

[159] It should be highlighted that KWAP is a statutory institution which in effect reports to the Finance Minister and that members of the board of KWAP, including its chief executive officer, and of its investment panel are appointed by the Finance Minister under ss 6 and 7 of the Retirement Fund Act 2007, respectively.

[160] The manner the SRC letter (P364) bearing the notation of the accused directed to the CEO of KWAP was delivered to KWAP appears unconventional. It was not sent to the office of the CEO at KWAP. It was instead hand delivered to her personally outside office and after official working hours, by the principal private secretary of the accused, the late Datuk Azlin Alias.

[161] The CEO of KWAP, Dato' Azian Mohd Noh (PW38) testified that she was given the original of the SRC letter of 3 June 2011 (P364) at a private meeting at a hotel lobby in KL Sentral. PW38 also stated that at this meeting, the late Datuk Azlin informed her that the Prime Minister had in fact agreed to SRC's application and proceeded to show her the written notation or the minute of the accused on the SRC letter.She testified that the notation of 5 June 2011 to her as the CEO of KWAP by the accused as the Prime Minister and

Finance Minister of the country, and the minister responsible for KWAP, on that letter of 3 June 2011 from the SRC for the RM3.95 billion loan, stating the accused's agreement with the proposal in the Malay language meant, to her understanding, that the accused agreed that KWAP should grant the loan to SRC.

[162] PW38 then related the matter to Tan Sri Wan Abdul Aziz Wan Abdullah (PW45), who was the Chairman of the KWAP, its investment panel while simultaneously also the Secretary General of the Ministry of Finance (the Treasury), the highest ranking civil servant in the Ministry of Finance and who reported directly to the accused as the Finance Minister then.

[163] When suggested during cross-examination that PW38 was not compelled or obliged to follow the notation by the accused on the SRC letter (P364), she responded (notes of proceedings dated 10 June 2019 — PW38) as follows:

> S: Sekarang boleh Dato' jelaskan apa maksud Dato' keterangan Dato' itu dalam konteks keterangan Dato' tempoh hari?
>
> J: As I mentioned earlier, the word compulsion and influence give different connotation. I did say there was no legal compulsion but I cannot say the same for the word influence. The notation in the letter addressed to me came from the Finance Minister, the Prime Minister, the Minister who is in charge of KWAP. He is my ultimate boss.
>
> S: Therefore?
>
> J: So I cannot say that there is no. I cannot deny that there is a certain amount of influence. That's all I can say.

[164] Thus PW38, the former CEO of KWAP testified that whilst there was no legal compulsion, she could not deny that there was a certain amount of influence in the notation directed to her in the SRC letter where the accused wrote that he agreed with the proposal from SRC for the company to obtain financing from KWAP. PW38 said the accused was the Prime Minister and the Minister who was in charge of KWAP, and her 'ultimate boss'.

[165] Tan Sri Wan Aziz (PW45) also gave evidence in his witness statement on the SRC letter (P364), that he had earlier been informed by the principal private secretary of the accused (Datuk Azlin) about SRC getting financing from KWAP and that the accused had already agreed to the same, as recorded in PW45's witness statement (PSSP45) as follows:

> Saya ada memberitahu kepada Dato' Azian bahawa sebelum itu, saya pernah dihubungi oleh Allahyarham Dato' Azlin bin Alias yang menyatakan SRC akan

memohon pinjaman daripada KWAP dan Dato' Sri Najib sudah bersetuju. Seterusnya, saya meminta Dato' Azian agar pihak KWAP dapat mengkaji permohonan tersebut untuk dikemukakan kepada Panel Pelaburan KWAP untuk pertimbangan dan keputusan.

[166] As correctly approached by the Chairman of KWAP (PW45), the loans application process must still be followed by KWAP. The SRC letter with the notation of agreement by the accused (P364) was given to the head of fixed income department of KWAP, Ahmad Norhisham bin Hassan who has since passed away. He was then assisted on this matter by an assistant vice president in the department, Amirul Imran Ahmat (PW29).

[167] PW29 made it clear in his testimony that the SRC letter (P364) with the notation of the accused's agreement was the basis of the financing by KWAP to SRC. Upon receipt of the SRC letter from his superior, PW29 wrote a draft email of 29 June 2011 (P366) to be sent by his head of department to Nik Faisal of SRC to request for information for processing purposes, which stated in no uncertain terms the following:

Dear En. Nik Faisal,

Reference is made to the conversation between Dato' Azian and Dato' Azlin of the Prime Minister's Office.

We take note of the Y.A.B Prime Minister's approval for KWAP's participation in the Proposed Financing of RM3.95 billion to SRC International Sdn Bhd (SRC International) ...

[168] This was accepted and emailed by PW29's superior to Nik Faisal (P368) which referred to the conversation between the CEO of KWAP and Datuk Azlin to have taken place on a day before, on 28 June 2011. PW29 also testified that ordinarily, KWAP would require more supporting documents before such an application for a loan is considered. He testified that it was strange to receive a mere two-page letter from Nik Faisal on behalf SRC asking for a loan. More unusually, the letter was actually addressed to the Prime Minister and Finance Minister applying for a RM3.95 billion loan as capital and investment for SRC. And the letter bears a notation by the accused which was addressed to the CEO of KWAP, specifying his agreement to the proposal by SRC.

[169] PW29 was then instructed to prepare a paper for the approval of the investment panel for a loan of RM1 billion to SRC. This investment panel paper was for the investment panel to determine whether such a loan could be considered for SRC. In accordance with its internal process and despite the agreement expressed by the accused however, KWAP proceeded to ask via emails for supporting documents (P366 and P368).

[170] But SRC failed to provide anything substantive. In an email dated 1 July 2011 (P369), tendered through PW29, Nik Faisal informed KWAP that SRC was unable to disclose further information on the Bandar Malaysia, KL International Financial District and other projects because they were in the master planning stage of development and that disclosure would be subject to the approval of the Prime Minister and chairman of the board of advisers of 1MDB. This was what was stated in that email (P369) from Nik Faisal:

> We are unable to disclose the further information requested as the real estate projects are in the master planning stage of development. Disclosure of the detailed information requested is subject to approval of the Chairman of the Board of Advisors and YAB Prime Minister for which we have sought and have not obtained clearance to disclose thus far.

[171] This email is somewhat odd. The Prime Minister and the chairman of the board of advisers of 1MDB was of course the accused himself. But despite expressly agreeing to the proposal for a loan of RM3.95 billion be granted by KWAP to SRC, he had seen it fit, according to the email from Nik Faisal, to not share the information requested by KWAP to enable due processing of the loan application.

[172] Notwithstanding that the requested information was not forthcoming, PW29, upon the instruction of his department head, proceeded to prepare a proposal paper for the investment panel. PW29 testified that the preparation of the paper was rushed, as demonstrated from the errors made on the paper. The simple errors related to the date on the said document which was stated as July 2010, where in fact it ought to have been dated June 2011. In any event the financial analysis on SRC could not be performed as it was newly incorporated, necessitating the analysis be made on its then parent instead, 1MDB. PW29 estimated that KWAP was only furnished with about 25% of the required information to approve the loan and had to act upon the limited information.

[173] This is the investment panel paper No 8/6/2011 for a financing of RM1 billion to SRC (P370). This was tabled by the late Ahmad Norhisham to the investment panel on 5 July 2011. The investment panel was of the view that RM3.95 billion was far too much for a loan to be given to only one company from one industry. As confirmed by its Chairman (PW45), the KWAP CEO (PW38) and another member (PW50), and as recorded the minutes of the meeting (P416), the investment panel was willing to consider a loan of RM1 billion, as mentioned in the paper, pending further information from SRC on its business and investment model. As such the final decision was deferred.

[174] In her evidence, PW38 also stated that the evaluation by the fixed income department of KWAP concluded that KWAP could provide a loan of only RM1 billion given considerations such as the high payment risk, national

risk, industry risk and over-concentration risk associated with SRC's loan application for RM3.95 billion. At the meeting of the investment panel on 5 July 2011, this proposal was agreed to but the panel decided to defer its decision pending submission of information from SRC.

[175] It was also at this meeting on 5 July 2011, as recorded in the minutes (P416), that an unidentified member suggested that the Prime Minister be updated of the stance of KWAP on the RM1 billion only loan. It is probably uncommon for the Prime Minister be updated on a progress of any proposal being considered by the investment panel but this was not asked of the witnesses from KWAP. The inference is it was thought that the accused had a special interest in this loan request such that at least as a matter of courtesy he should be updated.

The accused told PW45 to expedite the approval process and that a financing of RM2 billion would suffice

[176] I must here give emphasis on the evidence by Tan Sri Dr Wan Abdul Aziz Wan Abdullah (PW45). He was the Secretary General of the Ministry of Finance and given that position was also pursuant to s 6(4)(a) of the Retirement Fund Act 2007, the Chairman of the Board of KWAP as well as of its investment panel. His evidence is therefore especially important given that the criminal charge against the accused on the abuse of position under s 23 of the MACC Act concerns the role of the accused in respect of both the guarantees issued by the government on the financing of RM4 billion granted by KWAP to SRC.

[177] The proposal paper from the fixed income department (as approved by KWAP CEO (PW38)) for the meeting of the investment panel of KWAP on 5 July 2011 had initially suggested the approval of a loan of RM 1 billion to SRC, because, among others, the company (although by then wholly-owned by 1MDB) was a newly formed entity without any track record whatsoever in its proposed field of venture. The paper (No 8/6/2011) even highlighted that the very large loan amount of the proposed RM3.95 billion could if approved, result in a single borrower overconcentration risk to KWAP as the lender (about 5.16% of KWAP's total fund size).

[178] The paper also highlighted the credit risks of the proposal, as the source of repayment as the primary source was expected to be from returns generated from investments but SRC had only just begun identifying the investments. Further, SRC was thinly capitalised, and would rely solely on the proposed facility to funds its business and investment activities. Its parent, 1MDB too was in a similar position and relied solely on borrowings to fund its activities.

As at 30 April 2010, 1MDB reported a total borrowings of RM6.814 billion as opposed to its paid up capital of merely RM1m.

[179] Nevertheless, the paper suggested that as risk mitigation measures, the repayment ability of SRC would be supported by the cash flows generated from projects undertaken by 1MDB (even though the paper also stated that all of 1MDB's projects were still in the infancy stage). The paper stated that SRC had also indicated that it would only be investing in brownfield projects which had a shorter gestation period and would provide immediate cash flow towards servicing the facility. And together with a proposed guarantee from the government, the paper suggested that the risks would be fully mitigated, and that KWAP's participation in the facility to be extended to SRC be limited to RM1 billion only.

[180] It is the testimony of PW45, corroborated by that of the CEO of KWAP (PW38), that after the first meeting of the investment panel on 5 July 2011 on the first loan request where the investment panel deferred its decision on the proposal tabled for a loan of RM1 billion be granted to SRC, PW45 and PW38 met with the Prime Minister to update him of the position taken by KWAP on the loan request where the investment panel agreed at its meeting held on 5 July 2011 to consider extending only RM1 billion financing, pending submission of further information from SRC, as stated in the minutes of its meeting.

[181] Both PW45 and PW38 did not in court say that the accused at that meeting itself expressed any views or gave any directions upon being briefed on the status.

[182] However — and this is critical — Tan Sri Wan (PW45) testified that subsequently at the PMO, at the side lines of the many meetings which involved the Treasury Secretary General with the Prime Minister and Finance Minister, the accused had told PW45, who was both the Secretary General of the Treasury and the Chairman of KWAP that a financing of RM2 billion from KWAP to SRC would be sufficient. The accused also told PW45 for KWAP to expedite the loan approval process. This is crucially another evidence of the direct involvement of the accused.

[183] This testimony is especially significant because Tan Sri Wan (PW45) in his witness statement said that if there was no communication from the Prime Minister to him about SRC's loan application, the investment panel of KWAP would have maintained its decision to approve a financing of RM1 billion only (although the decision on RM1 billion was not final since KWAP had also requested for further information from SRC on its business and investment models, information subsequently provided by SRC even for the second loan request was not substantive and continued not to be fully verified).

[184] PW38 too confirmed the version given by PW45 that not long after that meeting of the investment panel on 5 July 2011, she accompanied Tan Sri Wan Abdul Aziz, as the Chairman of KWAP to meet the accused for that purpose. PW38 however could not remember the date of this meeting. In her witness statement, PW38 then stated that a proposal paper was subsequently prepared to be presented at a special meeting of the investment panel on 19 July 2011 where the recommendation was now for a RM2 billion financing be granted by KWAP to SRC.

[185] When questioned by this court why the proposal subsequently tabled to the investment panel on 19 July 2011 specified a loan of RM2 billion when PW38 and PW45 had only just briefed the Prime Minister and the Finance Minister that KWAP was considering only a RM1 billion loan, PW38 responded that she could not recall what had happened at or after the meeting with the accused that led to the increase in the loan amount proposal. This is the only reason why the financing amount was increased from RM1 billion as previously agreed by the investment panel to a proposal that it be raised to RM2 billion.

[186] And this then saw PW29 being instructed to prepare another proposal (special investment panel paper No 1/11/2011) (P372) for a financing of RM2 billion instead. When asked about another error in the paper which was erroneously dated to be July 2010 when in fact the paper was tabled on 19 July 2011, PW29 again explained that this was also done in a rushed manner. In fact the meeting was originally unscheduled, and had to be specially convened, as testified by Azlida Mazni Arshad, the Secretary to the Board of KWAP (PW35).

[187] That the accused had told PW45 to expedite financing and that RM2 billion for SRC would suffice is even recorded no less in the minutes of the investment panel meeting on 19 July 2011 (P417) itself. Paragraph 2.1 therein tellingly states:

> ... The investment panel noted that SRC International's request for the financing up to RM1 billion has been tabled during the previous panel meeting on 5 July 2011. The approval has been deferred pending KWAP's receipt of further information of SRC's International services model and investment plan.
>
> *The Chief Executive Officer ('CEO') reported that the Prime Minister has communicated to the Chairman of KWAP to expedite the financing and that a facility of RM 2 billion would suffice ...* (Emphasis added.)

[188] PW38 testified that before the start of that meeting she was asked by PW45, the chairman of the investment panel to update the said development to the investment panel. Crucially however it must be reiterated for emphasis

that even though PW45 stated during cross-examination that he did not consider the said communication with the accused as an instruction from the accused, in his witness statement, PW45 also clearly stated that if not for the communication with the accused on the KWAP loan to SRC, the Investment Panel would have maintained its initial decision to finance only RM1 billion to SRC.

[189] No less importantly, despite the accused having no part to play in the process, PW45 saw it fit that what was stated by the accused to him ought to be shared with the investment panel, the party which has the legal authority to approve the financing request. And further that it was even done in official fashion, as recorded in the minutes.

[190] The decision of the investment panel at the 19 July 2011 meeting was that a financing of RM2 billion was agreed to be given to 1MDB (and not SRC), with the Government of Malaysia as guarantor or that KWAP to extend the financing to the government who would then provide the financing to 1MDB. But SRC disagreed, and Nik Faisal wrote to PW38 vide a letter dated 12 August 2011 (P373) reiterating SRC's request for direct financing from KWAP, for RM2 billion. As mentioned earlier, the letter states that it was expected that the financing to SRC would be secured by a government guarantee. It is manifest that as early as 12 August 2011, SRC was confident that it would obtain a government guarantee to support its loan application.

[191] Because of this, PW29 had to prepare another paper for the consideration of the investment panel. This proposal for a financing of RM2 billion to SRC instead of 1MDB as previously agreed was contained in a circular paper No 19/2011 (P374). This was also rushed, and as testified by PW35, since the scheduled monthly meeting of the investment panel would not be so soon, and given the update at the most recent meeting of the investment panel that the financing should be expedited, the fixed income department was required to prepare this paper, to be circulated to the members in the absence of a physical face to face meeting, who would then provide their reply forms to PW35 to denote their decisions on the proposal. The paper was circulated to the members of the investment panel on 19 August 2011. All six members replied their approval.

[192] The accused was the Prime Minister. His direct involvement in the process to obtain financing for SRC is hardly ordinary. The relevant officials from the government or ministry department responsible for the promotion of the energy sector should instead have been the one interacting with KWAP. Or if the argument is that this is a MOF Inc entity, then the officials from 1MDB or SRC should lead the negotiations with the public authorities.

[193] Here, the accused decided that he agreed with the loan be taken from KWAP, and even asked for the loan to be expedited and for the amount to be increased from RM1 billion to RM2 billion. There is no suggestion that the accused as MOF Inc had exhibited similar interventionist conduct on behalf of any one of the many and several other companies owned by MOF Inc. And yet at this stage, although as the Prime Minister he had the authority to hire and fire the directors of SRC, the board of directors (other than the first named directors in the M&A) had not even been constituted. The shareholder of SRC too then was 1MDB, not yet MOF Inc directly.

[194] More significantly, the matter of the financing for SRC, given its nature as a new company with no track record, meant that the choice of KWAP as a potential financer was especially apt and opportune. This is because PW45 held the top positions in both KWAP and MOF. And in both positions, PW45 directly reported to the accused as the Finance Minister.

[195] It is true that KWAP investment panel, comprising members who were very experienced in the financial industry did undertake its own evaluation on the proposal. It could have even rejected the proposal if the same was found wanting in any material respects. But it did not. This according to the defence shows that the members were not obliged to follow what was said to be a directive from the accused for KWAP to approve the proposal.

[196] But the reality is it is difficult to envisage the RM2 billion financing be approved by the investment panel if the accused had not noted his agreement to SRC's request (P364) to PW38, and his communication to PW45, particularly that the loan should be expedited and be at RM2 billion, and that after PW45 and PW38 told the accused after the first meeting of the investment panel on the proposal that had decided only to approve RM1 billion.

[197] That communication from the accused to PW45 was even mentioned at the subsequent meeting of the investment panel (whose members were all appointed by the accused as the Finance Minister under the Retirement Fund Act 2007), and accordingly recorded in the minutes, as I have stated. Under such circumstances, it was simply no longer open for KWAP to reject the proposal. And the final decision was indeed that the financing of RM2 billion to SRC as told by the accused to PW45 was approved by the investment panel, and also after the matter was expedited, as similarly told by him to PW45, in the third proposal paper prepared by the fixed income department, one after another in a rushed fashion.

[198] It was not disputed however that the overriding justification for the approval for the financing to SRC, despite the risks highlighted by fixed income

department of KWAP and understood by the investment panel was the availability of a government guarantee for the repayment of the RM2 billion financing.

SRC requested MOF for the first government guarantee and the accused chairing Cabinet meeting approving it

[199] Whilst the Secretariat started to circulate the proposal paper for the RM2 billion financing to SRC (subject to a government guarantee), to the members of the investment panel on 19 August 2011, and bearing in mind the SRC letter of 12 August 2011 which had implied great confidence in securing the RM2 billion on the basis of a government guarantee, MOF issued a letter dated 22 August 2011 to KWAP, confirming its decision to provide a government guarantee for a RM2 billion financing by KWAP.

[200] As such, even before KWAP actually finally decided on approving the first loan request, SRC had already written to the MOF applying for a government guarantee for the anticipated RM2 billion loan from KWAP in a letter dated 12 August 2011. This was on a Friday, and led to Maliami Hamad (PW43), *Setiausaha Bahagian, Bahagian Pengurusan, Pinjaman, Pasaran Kewangan dan Aktuari* or the division head of the MOF's Loan Management, Financial Market and Actuary Division instructing his subordinate Afidah Azwa Abdul Aziz (PW41), the *Ketua Penolong Setiausaha Bahagian Pengurusan, Pinjaman, Pasaran Kewangan dan Aktuari,* to meet with the representatives of SRC on the immediate Monday, on 15 August 2011.

[201] Nik Faisal himself, on an appointment, came to MOF and met PW43 on 12 August 2011, and this in turn resulted in PW43 instructing PW41 to expedite the preparation of the Cabinet memorandum paper with great urgency.

[202] The purpose was to prepare an internal memo on the government guarantee request as well as a Cabinet memorandum or *Memorandum Jemaah Menteri* ('MJM') on an urgent basis, since the said MJM was to be tabled at the Cabinet meeting to be held two days later on Wednesday 17 August 2011.

[203] PW41 testified as to the extremely urgent manner in which the MJM was to be prepared which made it impossible for MOF to verify the verbal information furnished by SRC without any supporting documents. PW43, her superior, stated in his testimony that the pressure to rush came from not only SRC, the principal private secretary of the Prime Minister and his superior PW45, the Secretary General of the MOF but that PW43 also testified that he knew that PW45 too in turn received instruction on the same from the accused as the Prime Minister. The pressure was because the witness had only little time

to prepare the Cabinet memorandum for the guarantee, which must be tabled to the Cabinet on 17 August 2011, the same week when the instructions were received by him.

[204] PW41 testified in cross-examination that she was not comfortable with having to expedite the matter but suggested that her complaints to her superior, PW43 fell on deaf ears. In fact, as I have stated earlier, she was told by him that the matter must be rushed and given priority because SRC was, in her words, 'syarikat PM' or the Prime Minister's company.

[205] When asked in cross-examination to elaborate on this exchange with PW41, PW43 who testified subsequently stated that he could have given the impression that the accused had a special interest in SRC, by which he meant that the accused as the Prime Minister wanted to see SRC quickly start its operations.

[206] PW41 also testified as to the unusual circumstances whereby SRC representatives were present at MOF to provide information needed for MOF to prepare the Cabinet papers, which plainly were highly confidential as the Ministry had to deal with the affairs of the state for deliberation by the Cabinet. The standard process is for MOF to request the applicant company to provide the requisite information to MOF.

[207] Thus, the urgency of this proposal means that the usual process was not followed. Worse, the quality and integrity of the contents of the Cabinet papers or the MJM on the proposal for the issuance of a government guarantee of RM2 billion for the financing of the same amount by KWAP to SRC is also questionable.

[208] This, I repeat, is because PW41 further testified that the urgent manner in which the MJM was to be prepared and submitted made it impossible for her to verify the information provided by SRC. Instead PW41 had to rely on the verbal information given by SRC without any supporting documentation. PW41 stated that this was not the normal way in which MJM seeking for loans were prepared at MOF. PW43 confirmed that due to the urgency in preparing the MJM for the first government guarantee, PW41 had to just rely on the information provided by SRC.

[209] The MJM (P537B) by its terms, as prepared, dispensed with the need for any input from other agencies or Ministries. At the same time the recommendation was also that the Finance Minister should have full power to determine the terms and conditions of the RM2 billion loan. It is reasonable to have expected the views of other Ministries such as the one responsible for energy to be sought. That was not the case.

[210] PW43 further testified that MJM which in the case of government guarantees as processed by and originating from MOF would ordinarily have to be escalated to the Second Finance Minister, but in this instance, the instruction given to PW43 by the Treasury Secretary General (PW45) was for the MJM to be escalated to Tan Sri Mohamed Nor Yakcop, the Minister in the Prime Minister's Department who signed the MJM on 15 August 2011 before tabling the same at the meeting of the Cabinet on 17 August 2011. Tan Sri Nor was the Minister in the Prime Minister's Department in charge of the Economic Planning Unit, and was involved in the initial evaluation by EPU of 1MDB's request for the RM3 billion grant to set up SRC. This MJM is stated to be a memorandum from the Prime Minister.

[211] It should be stated that this MJM dated 15 August 2011 did not disclose that SRC had applied for financing of RM2 billion from KWAP. However at that point in time approval from the investment panel had not been obtained by SRC. More importantly, the MJM stated that the guarantee from the government was warranted because SRC was a new company about to operate in a sector that necessitated huge funding capabilities such that support from the government was essential. Given that SRC would be executing a strategic role in natural energy resources in consonance with the 10th Malaysia Plan and the National Energy Policy, the guarantee would serve to facilitate SRC obtain financing at a cheaper cost. There is no mention however of any specific use of the financing from KWAP proposed to be guaranteed. Neither is any investment project identified in the MJM.

[212] The accused attended and chaired the Cabinet meeting on 17 August 2011 which approved the MJM on the provision of the government guarantee for the RM2 billion financing from KWAP to SRC. This is recorded in the minutes of the said Cabinet meeting (P536). The said minutes were confirmed in the subsequent meeting of the Cabinet the week after (P538). The accused did not mention anything about his private interests in SRC.

[213] Post the Cabinet approval, Wedani Senen (PW24), the remittance manager at AmBank, confirmed that the RM2 billion financing was disbursed into SRC's Am-Islamic Bank account on 29 August 2011 in four transactions of RM500m each as recorded by four thermal receipts respectively. As such, less than two weeks after Cabinet approval for the guarantee, KWAP released the entire RM2 billion to SRC.

[214] The irresistible inference is that the accused had through others caused the processing of the government guarantee be expedited, resulting in the inability of MOF to even verify the information contained in the MJM tabled to and approved by the Cabinet, which the accused chaired.

Pre-approved decision by the accused to transfer ownership of SRC from 1MDB to MOF Inc

[215] Datuk Mat Noor Nawi (PW44), a Deputy Secretary General of Treasury testified that his action to execute the process to transfer the ownership of SRC from 1MDB to MOF Inc was to formalise the decision which had already been agreed to by the accused, describing it as a top down decision making process. The draft working paper prepared by PW44 to formalise the response by MOF to SRC's request had to be taken by PW44 to the air force base airport to the accused who then wrote his agreement on the draft paper itself.

[216] PW44 testified that it was a representative of 1MDB who acted as a liaison person with the MOF who had told him that the accused wanted to see the response from MOF and it was also the same representative who told PW44 to meet the accused at the airport for that purpose.

[217] The transfer of the share ownership in SRC from 1MDB to MOF Inc was for MOF Inc executed on 14 February 2012 by the accused himself.

[218] The approval process was not only a result of a top down decision-making, but also driven by SRC, not MOF. Both were made possible by the influence if not direction of the accused.

The second RM2 billion KWAP financing — Preceded by Cabinet approval for the second guarantee

[219] In respect of the additional loan of RM2 billion from KWAP to SRC, the Cabinet approval for the second government guarantee actually preceded even the request from SRC for the additional loan was made to KWAP. The MJM, this time stated to be from the Finance Minister (as opposed to the Prime Minister in the MJM for the first guarantee) was signed off by the accused on 3 February 2012. On 8 February 2012 the Cabinet approved the second government guarantee at the meeting chaired by the accused. The minutes of this meeting (P539) was further confirmed the Cabinet meeting of the following week (P540).

[220] As such, only six months after the first loan of RM2 billion from KWAP was credited into SRC account, PW41 at the MOF was on 2 February 2012 again instructed by PW43 to meet with Nik Faisal of SRC to discuss the second government guarantee applied for by SRC. She prepared an internal memo from the Deputy Treasury Secretary General to the Prime Minister through the

Second Finance Minister who supported the same on even date. The accused signed the MJM for the Cabinet as the Prime Minister the next day 3 February 2012.

[221] Again, instead of the MJM being approved by the Second Finance Minister, PW41 was not informed as to why, in this instance, the instruction given to her was for it to be approved by the Prime Minister. The MJM was completed on the same day by PW41 (D527B) which like for the first guarantee, also stated that no feedback from other Ministries were necessary, and recommended that authority be given to the accused as the Finance Minister to decide on the terms and conditions of the guarantee. The MJM was submitted to the Cabinet Division on 6 February 2012, and tabled for the consideration of Cabinet on 8 February 2012. The accused, as Prime Minister chaired the Cabinet meeting which approved the MJM.

[222] This MJM also did not mention that an application for the financing would be made to KWAP, which is not unusual since KWAP was only formally approached by SRC in the latter's letter of 13 March 2012 (P383) to the CEO of KWAP (PW38) for the additional RM2 billion. The MJM did state that the earlier RM2 billion from KWAP had been utilised for strategic investment purposes, and identified the joint venture with Aabar Investments PJS, an Abu Dhabi Government sovereign wealth fund (about RM1.57 billion) and participation in PT ABM IPO Investama Tbk which is listed on the Indonesian Stock Exchange (RM376.8m). The justifications for the second guarantee were however as similarly stated in the MJM for the first.

The application for the second RM2 billion financing from KWAP is based on the shareholder minute issued by the accused

[223] It was only after the second government guarantee was approved by the Cabinet on 8 February 2012 that SRC wrote to KWAP in a letter dated 13 March 2012 (P383) applying for a further loan of RM2 billion. It is important to appreciate that the board of directors of SRC had by way of a directors' circular resolution approved earlier on 17 February 2012 that the company should seek an additional RM2 billion loan from KWAP (P385). This DCR is in line with a shareholder minute of even date (P501, D534 and D534) specifying the same terms resolved in the DCR, and executed by no other than the accused himself, as the MOF Inc by then the sole shareholder of SRC.

[224] Again, this led PW29 of KWAP, along with his superior the late Ahmad Norhisham, meeting with several representatives from SRC to seek further information in respect of the second application for loan. This eventually resulted in the tabling to investment panel on 20 March 2012, the paper No 11/3/2012 (P387) on the additional facility of RM2 billion sought by SRC.

[225] It is noteworthy that this paper to the investment panel is especially specific in stating in para 3.2 on the background of the proposal in the following clear terms:

> 3.2 The Government had approved the Guarantee on 16 February 2012 while the Minister of Finance had subsequently approved and advised for the Additional Facility to be procured from KWAP as KWAP is the financier to the Original Facility ...

[226] This self-explanatory statement was further recorded at para 4.11 in the minutes of the investment panel meeting (P476). It was stated in the minutes of the meeting of the investment panel of KWAP on 20 March 2012 (P476) which approved the second financing of RM2 billion to SRC that the Minister of Finance had approved and advised for the additional RM2 billion to be procured also from KWAP as KWAP was the financier to the first facility at comparable terms with the first RM2 billion.

[227] As such, in similar fashion to the first financing of RM2 billion, the meetings of the investment panel which deliberated on the proposals were notified, even officially as stated in the papers and recorded in the respective minutes, of the position of the Prime Minister and Finance Minister on the requests from SRC. For the first, it will be recalled that PW38 as the CEO of KWAP updated the meeting what the accused had conveyed to the KWAP Chairman and chairman of the investment panel (PW45) on the amount of RM2 billion being sufficient (despite the accused being earlier told by PW38 and PW45 that the investment panel had wanted to approve only RM1 billion) and for the matter be expedited by KWAP. In the second, the paper to the investment panel made it clear that the accused as the Minister of Finance had approved the request be made to KWAP again. No doubt, in truth, the accused had approved in the capacity of MOF Inc being the shareholder of SRC, but under the law, MOF Inc as I will discuss later, is the Finance Minister.

[228] The views or stance of the accused on the loans requests by SRC, even as the Prime Minister, is wholly irrelevant to the process of determining whether approval for the financing should be granted, with the Retirement Fund Act 2007 vesting that approving authority in the investment panel. Section 7(1) makes it explicit that the investment panel is responsible for matters pertaining to the investment of the fund. Under s 7(4) the involvement of the Finance Minister is only on general and policy matters and that too in an indirect fashion as it states that the investment panel shall be subject to directions as to general policy that may be issued by the Board of KWAP and approved by the Minister from time to time.

[229] In addition, under s 14, the Finance Minister only has involvement in certain types of investments — and do not include loans. Section 14 of the

Retirement Fund Act 2007 provides as follows:

14 Investment of the Fund

(1) The Investment Panel shall, subject to such restriction or limitation as may be imposed in any direction issued under subsection 7(4), invest the Fund —

(a) on deposit in any currency including the ringgit in —

(i) the Central Bank of Malaysia;

(ii) any duly licensed financial institution as defined under the Financial Services Act 2013 [Act 758];

(iii) any development financial institution as defined under the Development Financial Institutions Act 2002 [Act 618];

(iv) any Islamic bank under the Islamic Financial Services Act 2013 [Act 759]; or

(v) any bank or duly licensed financial institution outside Malaysia;

(b) in money market instruments, including treasury bills, bankers' acceptances, certificates of deposit and any financial instruments recognized by the relevant regulatory body in any currency including the ringgit;

(c) in loans, on terms remunerative to the Retirement Fund (Incorporated), to the Federal Government or the Government of any State in Malaysia subject to Article 111 of the Federal Constitution;

(d) *in loans, on terms remunerative to the Retirement Fund (Incorporated) and with the acceptable credit criteria, in respect of any public authority or corporation in which the Federal Government has an interest;*

(e) *in loans, on terms remunerative to the Retirement Fund (Incorporated), in respect of any company*;

(f) in bonds, commercial notes, private debt securities, promissory notes and bills of exchange within the meaning of the Bills of Exchange Act 1949 and other negotiable instruments of similar nature on terms remunerative to the Retirement Fund (Incorporated), in respect of any company or corporation;

(g) in bonds, commercial notes, private debt securities, promissory notes and bills of exchange within the meaning of the Bills of Exchange Act 1949 and other negotiable instruments of similar nature on terms remunerative to the Retirement Fund (Incorporated), in respect of any public authority or corporation in which the Federal Government has an interest;

(h) in the acquisition or subscription for shares or debentures in any public company whose securities are listed or have been approved for listing on a stock exchange in Malaysia, the issue or sale of which has been approved under the Capital Market and Services Act 2007 or securities in a

company which has been approved to be listed in any stock exchange outside Malaysia subject to the listing of such security being approved by law in the foreign jurisdiction;

(i) in the securities of companies or corporations which are not listed and quoted on any stock exchange established in Malaysia provided that the total amount of moneys so invested in any one such company or corporation shall not exceed thirty per centum of the total amount of shareholders' funds of that enterprise at the time of the investment unless prior written approval of the Minister is obtained to invest in excess of such percentage;

(j) in the acquisition of movable or immovable property and interests therein;

(ja) with the approval of the Minister —

(i) in the development of buildings, infrastructure and natural resources, and the interest within;

(ii) in securities issued or fully guaranteed by any sovereign government, supranational or multilateral organization and includes securities where any sovereign government, supranational or multilateral organization is the obligor;

(iii) in securities issued or fully guaranteed by the Government of Malaysia, secured by any sovereign government, supranational or multilateral organization and includes securities where any sovereign government, supranational or multilateral organization is the obligor and any instrument issued by the Central Bank of Malaysia;

(iv) in purchasing securities or subscribing to any product for the purpose of hedging the investments of the Fund;

(v) in private equity fund managed by —

(A) any fund management company registered with the Securities Commission Malaysia or Companies Commission of Malaysia;

(B) any fund management company registered by any regulatory body outside Malaysia; or

(C) any limited liability partnership registered by any regulatory body outside Malaysia;

(k) in any other investment with the approval of the Minister.

(2) In granting any approval under paragraph (1)(i) and (ja), the Minister may impose such terms or conditions as he may consider necessary.

(3) Any person who causes moneys or any property to be invested in contravention of this section shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding two million ringgit or to imprisonment for a term not exceeding ten years or to both. (Emphasis added.)

[230] Yet, PW45 and PW38 thought it was important for them to share with the investment panel what the position of the accused was on the requests by SRC to KWAP in respect of each of the RM2 billion financing. It is true that the accused had no authority to approve the loans. Nor could either of PW45 or PW38 individually. Hence, the investment panel.

[231] In my view, if it was not the case of PW45 and PW38 obeying the instructions of the Prime Minister and Finance Minister, it is manifest that they considered the influence of the accused to be sufficiently predominant so as to ensure that the investment panel was also apprised of the stance of the accused on the same.

[232] Further, PW29 of the fixed income department at KWAP testified that for the second loan, the annual interest rate was fixed at 4.65% for the first three years, pegged with the ten-year Malaysia Government Securities (MGS) plus 70 basis points annually from the fourth year. Interest payment by SRC for every six months was RM50.8m, and the principal payment would commence from the sixth year.

[233] PW29 confirmed that he had received an email copy dated 22 March 2012 (P388) from Nik Faisal of SRC addressed to the CEO of KWAP outlining SRC's potential investments (in what were identified as ETT and Electrum), but Nik Faisal cautioned that as SRC was under very strict non-disclosure agreements for these transactions and some involved price-sensitive information on major international stock exchanges, the information must be handled with extreme care as SRC could be liable for any disclosure of such information to both the counter parties and also the regulators of the respective countries.

[234] Both PW29 and PW38 stated in their respective witness statements that the financing of RM4 billion by KWAP was unprecedented in size, and the largest they had seen.

[235] It is therefore as manifest, if not as blatant as that. The second RM2 billion was applied by SRC because the accused as its shareholder (MOF Inc) told the directors to do so. If the first RM2 billion financing was triggered by that notation by the accused to the CEO of KWAP agreeing with the loan request, this second RM2 billion found an even clearer decision made by the accused as a shareholder of SRC. And the investment panel was then told that the accused as the Finance Minister had approved for it be sought from KWAP.

[236] It needs no reminding that the members of the investment panel were appointed by the Finance Minister under s 7(2) of the Retirement Fund Act 2007, including its Chairman and the KWAP CEO. And under s 6(4), the

Chairman of KWAP is also the Secretary General of the Treasury which office reports to the Finance Minister who at the material time was the accused. The approval of the additional financing by the investment panel too was predicated solely on the government guarantee, approved by the Cabinet chaired by the accused, as evidenced in the formal guarantee executed by the accused on behalf of the government.

The accused reversed the condition on progressive drawdown of the financing into single payment to SRC

[237] Even though the investment panel meeting on 20 March 2012 which approved the paper on the second financing (P387) had imposed a condition that the drawdown be released in tranches, instead of a one lump sum release to the SRC, this was reversed pursuant to a meeting involving the accused, the Treasury Secretary General, the CEO of KWAP and a Deputy Head of Treasury. This meeting was referred to in an email dated 22 March 2012 from Nik Faisal to PW38 (P388), copied to PW29, the assistant vice president in the fixed income department in KWAP.

[238] PW29 testified that he was informed that in a meeting with the accused attended by KWAP CEO (PW38), Tan Sri Wan Abdul Aziz (PW45) and Dato' Mohd Irwan Siregar Abdullah (then a Deputy Secretary General of the Treasury), it had been decided that SRC ought to be provided with the financing in accordance with the conditions for the first financing. PW29 referred to the email that was addressed to PW38 (P388),to which he was copied, where Nik Faisal stated that:

> I just received a call from YAB Prime Minister and Minister of Finance informing me of the following decisions made resulting from YAB's meeting with YBhg Tan Sri KSP, YBhg Datuk TKSP Irwan, and YBhg Datuk on Thursday, 22 March 2012:
>
> 1. That SRC International Sdn Bhd ('SRC') is to execute agreements with KWAP for the 2nd RM2b Government Guaranteed Loan with exactly the same loan agreements, ie:
>
> – Bullet draw-down of RM2b upon signing of agreement
>
> –Interest rate is exactly the same terms as per previous agreement
>
> – Repayment is exactly the same terms as per previous agreement
>
> – Usage of funds is exactly the same terms as per previous agreement
>
> – All other terms as per previous agreement

[239] This therefore resulted in yet another paper, circular paper No 7/2012 March 2012 (P389) to the investment panel for the approval that the drawdown be effected in one lump sum of RM2 billion. Again it is observed

A that the reason stated for the change in the manner of drawdown is attributed to the update by SRC post the investment panel approval on 20 March 2012 that at the meeting at the Prime Minister's Office it was agreed among others that the second financing should be based on the terms of the first.

B **[240]** As such, just like the main approvals for the two financings, the investment panel, the approving authority, was formally informed of the involvement of the accused in the paper submitted to the investment panel which required the reversal.

C **[241]** This reversal was approved by the investment panel. However since the investment panel only just had its meeting on 20 March 2012 the paper was submitted by way of circularisation to the members all of whom (apart from one who was overseas), responded by sending their respective approvals back D on the same day on 23 March 2012 apart from one on 25 March 2012, and with one out of the six members who responded to sign off their approval provided comments that SRC should provide its progress report on its investments, and use of funds from the financing and submit its audited accounts, annually.

E **[242]** Yet again, the involvement of the accused is made plain. Even on a matter pertaining to the terms of the drawdown of the additional RM2 billion. Consistent with the overall approach of rushing all related approval process, at KWAP as well as MOF, similarly here the concerns seem more for the entire F additional RM2 billion be quickly disbursed to SRC.

[243] The reason for the investment panel deciding on the progressive payments approach was to ensure the existence of viable investment G opportunities to justify release of the funds, and for KWAP to be able to better monitor the use of the financing proceeds by SRC. The minutes of the meeting on 20 March 2012 (P388) states the following:

> The Investment Panel deliberated on the terms and conditions of the proposed additional facility and requested that the facility be disbursed on scheduled draw H down basis instead of one lump sum for KWAP to have better control over the utilisation of the loan.

[244] Incidentally, the investment panel was also concerned about the size of I the financing. In the same minutes, the following is recorded:

> The Investment Panel also agreed for KWAP to review the loan limit for government guarantee to avoid over-concentration risk to any of the loans granted to the borrower.

[245] The rationale for the single release appears to be on the basis that the earlier terms ought to be followed. This is at best tenuous, especially since the investment panel might have had different concerns after evaluating the development and progress of the use of the first RM2 billion.

[246] This circular paper No 7/2012 March 2012 (P389) to the investment panel for the approval that the drawdown be effected in one lump sum of RM2 billion did state that to provide comfort to the investment panel, two matters had been decided on but 'shall not be imposed as conditions' to the additional facility. These are first, the appointment of a Deputy Secretary General of the Treasury (PW44) to the board of directors of SRC. This never took place. Secondly, SRC was to disclose some of the investment opportunities which were at the advanced stages of negotiations. This was provided in the said circular paper.

[247] It should however also be emphasised that even in this circular paper which now recommended a single release of the RM2 billion following the meeting at the PMO, it is stated that the review by KWAP was not able to verify and ascertain the reliability and accuracy of the information provided by SRC on the said potential investments. Only that KWAP can ultimately take comfort in the government guarantee.

[248] It will be recalled that even when the investment panel approved the first financing of RM2 billion at its meeting on 19 July 2011, the minutes (P417) recorded that the panel asked that the financing should not be disbursed in one lump sum but instead to be structured based on progressive disbursement backed by documentary evidence of investments. However, when another paper to finalise the financing details was submitted to the investment panel (P374) by way of circularisation, the terms of the facility included that the drawdown was to be in one lump sum.

The accused executed the second guarantee and asked PW45 for KWAP to release RM2 billion before finalisation of the guarantee

[249] The accused himself executed the second government guarantee on behalf of the government as the Prime Minister and Finance Minister. This was the 'Letter of Guarantee Relating to the Islamic Term Financing Facility of RM2,000,000,000.00 Granted to SRC International Sdn Bhd' dated 27 March 2012.

[250] KWAP then received a letter from MOF dated 28 March 2012 (P397) stating the agreement of the Government of Malaysia to provide a government guarantee to KWAP for the second RM2 billion financing to SRC for a period of ten years in line with the Cabinet decision made on 8 February 2012. That

A is of course not new information. What is probably unexpected is that this same letter from MOF to KWAP further asked for the drawdown of the monies be made to SRC prior to the receipt by KWAP of the signed government guarantee, which the letter stated would be sent by MOF within ten working days.

B

[251] According to the Secretary General of the Treasury (PW45), the accused had telephoned him to ask that KWAP immediately release the second RM2 billion to SRC which was even before the formal guarantee document was furnished to KWAP. This then led to PW43 issuing the said letter, prepared by C PW41, from MOF to KWAP dated 28 March 2012 (P397), requesting KWAP to release the RM2 billion loan to SRC prior to MOF submitting the government guarantee to KWAP as the lender.

D **[252]** Unsurprisingly, PW29 of KWAP and PW45 as well as PW41 and PW43 of MOF testified that such a situation was unprecedented. Tan Sri Wan Aziz (PW45) stated that it was an unusual practice for KWAP to start disbursing loans which were guaranteed prior to the actual availability of the official guarantee. PW41 was told by PW43 that SRC needed the funds E urgently. PW43 gave evidence that that had never happened before and the guarantee then had not yet been finalised by the Treasury Solicitor.

[253] PW43 admitted he issued the letter (P397) because he was directed to do so by the Secretary General of the Treasury (PW45) who had told him this F was requested by the Prime Minister. As a matter of course, as confirmed by Wedani Senen (PW24), the manager for RENTAS transactions at Ambank, the RM2 billion was credited into SRC's account on 28 March 2012, which was on the same day the MOF letter (P397) was dated and sent to KWAP.

G

[254] Another aspect of his testimony that should be mentioned is that PW45 asserted that he was not aware of any memorandum prepared by the then Deputy Treasury Secretary General (Policy) to seek Cabinet's approval for a government guarantee of SRC additional RM2 billion loan from KWAP. H According to Tan Sri Wan Aziz (PW45), the memorandum, which given the format, appeared more like a personal memorandum by the Deputy to the accused as the Finance Minister was not even copied to him and it never reached his office. PW45 said he only got to know about it after the Cabinet had approved the granting of the second guarantee.

I

[255] The court had also questioned PW45 whether the accused had discussed with him on other matters related to SRC other than what the witness had mentioned in court. His answer was in the negative.

[256] Further, whilst PW45 agreed to the suggestion during cross-examination that there was nothing wrong for a Prime Minister to push hard to expedite the implementation of certain projects, with examples given by lead senior counsel being the Langkawi International Maritime & Aerospace ('LIMA') exhibition (where it was stated that a hotel was built even prior to the completion of the land acquisition) and the North South Expressways (NSE-PLUS) project where the defence claimed the paperwork and formalities would follow only subsequent to its implementation, Tan Sri Wan Aziz (PW45), who was at the material time also in the Treasury but in different capacities, responded, when re-examined, that unlike LIMA and NSE, SRC had nothing to show how the massive financing of RM4 billion from KWAP was utilised, for which he had no knowledge.

[257] PW45 however said that he would not have compromised the interest of the Government or KWAP and did not think that it was wrong for KWAP to have released the additional financing of RM2 billion as officially requested by the MOF in that letter of 28 March 2012 before KWAP receiving the formal executed document on the second government guarantee. This is because the Cabinet had by then already approved the issuance of the guarantee.

[258] This in my view is not an unreasonable opinion expressed by PW45, who was also the Chairman of KWAP, but from the perspective of the lender, in this case, KWAP, the disbursement of the entire financing of RM4 billion to the borrower even before the lender having in possession the formal evidence of the security document such as in the form of the government guarantee, is certainly not a standard commercial lending practice considering the risk that the document might not be received for whatever reasons, notwithstanding that the MOF in that letter undertook to deliver the document within ten working days. This is also the stance taken by KWAP's PW38 and PW29, as mentioned earlier.

The accused refused permission to Second Finance Minister to check status of SRC's funds in Switzerland

[259] Dato' Seri Hj Ahmad Husni bin Mohamad Hanadzlah (PW56), a former Second Finance Minister testified that the accused had expressly instructed him not to interfere with any matters concerning 1MDB and SRC. PW56's suggestion for him to visit Switzerland to verify the status of the funds of SRC deposited at BSI Bank in Lugano said to have been frozen by the Swiss authorities was flatly refused by the accused without any explanation.

[260] This was despite the Second Finance Minister having the authority of supervision over all companies owned by MOF Inc and in pursuance of

Ministerial Functions Order in PU(A) 222/2009 which clearly gives both the Minister of Finance and the Minister of Finance II authority over these MOF Inc entities.

[261] Based on PW56's testimony, when he asked for a feasibility study to be done to obtain a clear picture in relation to the nature of the business and the risks and liabilities involved in respect of 1MDB and SRC, the accused told him 'I know what I am doing, I am going to go ahead'. When he tried to discuss with the accused the Petro-Saudi — 1MDB joint venture deal, the accused tersely said to him, 'Husni, today onwards, you don't get involved. I don't want you to interfere in 1MDB'. His exclusion from 1MDB and SRC matters seems confirmed by the conduct of the officers of SRC, given that PW56's various attempts to contact Nik Faisal, its CEO went largely unheeded notwithstanding his status as the Second Finance Minister.

[262] As problems later surfaced and SRC was unable to make payments to KWAP as required by the financing agreements, resulting in KWAP stating its intention of declaring an event of default (P549 and P550) and recalling the entire loan sum together with interest which amounted to approximately RM9.2 billion, the Government of Malaysia, as the guarantor would thus be liable to pay the entire sum. This eventually at least as evidence shows, saw the MOF, for the Government of Malaysia issuing three additional short term loans to service the repayment of the loans taken by SRC. It is noted that out of the three additional short term loans, the accused personally gave the approval to grant the latter two additional short term loans, without first tabling them before the Cabinet, one amounting to RM250m (P553) and the other amounting to RM300m (P555).

[263] The above series of conduct and involvement, among others, on the part of the accused vis a vis SRC, when viewed in its totality and taken together and cumulatively, disclosed evidence which cannot be construed as purely being a lawful exercise of the accused's official duty as either the Prime Minister, Finance Minister or advisor emeritus in SRC because such conduct and involvement transpired beyond the ordinary and was outside the usual conduct or involvement expected of a Prime Minister and Finance Minister, similarly circumstanced. Even for a Prime Minister who was vested with certain powers under the M&A of SRC and for a Finance Minister who as MOF Inc was the shareholder of the company. It is manifest that KWAP approved the financing the way it did, and the MOF facilitated the granting of the guarantee which was approved by the Cabinet only because of one reason and no other. It is that the accused had used his position as the Prime Minister and the Minister of Finance to ensure the same, by the series of actions and conduct that I have set out.

[264] Such conduct and involvement exhibited by the accused instead serves only to demonstrate the existence of private and personal interest on the part of the accused in SRC, which interest, in my judgment, is in the nature that is envisaged under the law to fall within the ambit of s 23 of the MACC Act.

The nature of the interest of the accused

[265] These actions and decisions made by the accused concerning SRC, outside the ordinary course of his professional and official positions, tantamount to an interest in SRC that falls under the ambit of s 23 of the MACC Act. He should have stated that he had endorsed the setting up of the company, his powers in the M&A of the company, the decisions he had made as shareholder either directly or through 1MDB, his involvement in the financing process at KWAP and the guarantee process at MOF as well as the transfer of ownership directly to MOF Inc.

[266] I accept that this species of interest is not the typical type which was found in many of the cases, as correctly highlighted by the defence. It is not that the accused or any member of his family is the registered or beneficial owner of the shares in SRC. That was clearly 1MDB (itself wholly owned by MOF Inc) at the time of the first financing of the RM2 billion, and later MOF Inc when the second RM2 billion was applied for, both from KWAP which reported to the accused as the Finance Minister.

[267] The foundation and mainstay of the nature of the interest of the accused in SRC is the feature of control. The accused wielded considerable control over SRC. He held the position of overarching authority and power in SRC. This control was rooted in the various seemingly lawful capacities in the governance and ownership of the company exercisable by the accused. The accused had a secret design and private interest in a company he controlled as demonstrated in the course and series of his conduct and action concerning the establishment, financing, guarantee and ownership of SRC which were outside the remit of the exercise of official and public responsibilities.

[268] As the Prime Minister with special powers over the directors in article 67 of the M&A, as advisor emeritus which compelled prior consultation on important and strategic matters and as the sole shareholder of the company, the accused's control was absolute and complete. And his exercise of such authority, pervasive and imperious, as demonstrated by his interactions with parties outside SRC like PW38, PW45, and PW56 directly, and others in indirect manner through the exercise of tacit but predominant influence founded on that position of overarching control.

A **[269]** Two important points must be made again. First, the accused was not just one public servant who was granted these positions in SRC. The person who was vested with this authority was the country's Prime Minister (via the articles on directors' appointment and dismissal and on advisor emeritus) and Finance Minister (as the shareholder via MOF Inc). He was also the advisor
B emeritus under the M&A of SRC.

[270] Secondly, and this is especially crucial, the accused was himself instrumental in bringing about these monumental powers of control upon himself. After he endorsed the establishment of SRC, Nik Faisal registered the
C M&A upon the incorporation of the company by inserting articles 67 and 116 on the powers of appointment and termination of directors of the board of the company to be vested in the Prime Minister (as well as on the requirement of the Prime Minister's approval before any changes to the M&A could take
D effect). This could not have been conceivably effected without the consent of the accused as the Prime Minister. Indeed the accused did exercise these powers when appointing the directors of SRC subsequently.

[271] The creation of article 117 on the Prime Minister being the advisor
E emeritus of SRC was, as on the paper recommended by Nik Faisal, approved by the accused as the Prime Minister, as similarly done by the sole shareholder of SRC, who as MOF Inc was also the accused. And MOF Inc being the direct shareholder (instead of indirectly through 1MDB) was also pre-approved by
F the accused as the Prime Minister upon the recommendation of, again, Nik Faisal of SRC.

[272] His controlling interest in SRC, probably not found in any other MOF Inc — owned entities to the same extent, means that any decision as the Prime
G Minister or Finance Minister in respect of the government guarantees, as framed in the charge against the accused would have been tainted given the obvious conflict. The conflict lies in the fact that whilst the Cabinet which was presided by the accused himself as the Prime Minister would certainly have the responsibility to assess the matter under deliberation at the meetings — of
H whether to approve the government guarantees to the financing to SRC by KWAP — on the basis of the considerations on government, national and public interests, the accused who chaired the meeting personally had a starkly different consideration in the borrower company over which he had overarching control and private designs and interest.

I **[273]** His involvement could not have been in the best interest of KWAP or the MOF. The financing was primarily approved because of the government guarantee, and less on the commercial justifications of the activities of SRC that supposedly required the massive financing of RM4 billion. But the

guarantees were approved on the basis of unverified information furnished by SRC, which appear to be not much different from that earlier commercial justifications submitted to KWAP.

[274] It was decidedly in his interest that the guarantee be approved on both occasions. After all given his considerable powers in SRC, as shown earlier, the accused got SRC to apply to KWAP for financing, told KWAP CEO (PW38) that he agreed to the financing, informed KWAP Chairman and Secretary General of the Treasury (PW45) that RM2 billion would suffice (after the accused had been updated that the investment panel was considering to extend only RM1 billion) and at the same time asked PW45 that the approval process be expedited, rushed the process at the MOF on the preparation of the MJM on the government guarantees, and even told its highest ranking civil servant who was also Chairman of KWAP (PW45) for KWAP to release the second RM2 billion to SRC even before the guarantee document could be made available to KWAP. After all, despite the rush (almost singularly attributed to the accused) to drawdown the total of RM4 billion sourced from the pension fund KWAP, the bulk of the RM4 billion was rapidly instead inexplicably transferred outside the country with no clear confirmation of its actual present status, whilst SRC continued to default on its financing obligations, and nothing to show for any of its purported investments.

[275] All these evidence, and more, exhibiting the accused's controlling interest and SRC's unrelenting pursuit for financing and funds be made available to SRC on urgent basis, and curiously despite the absence of a well-verified and documented, let alone compelling strategic and investment opportunities, could not by any stretch of imagination possibly have been reconciled with what was expected of him as a member of the administration, which at a Cabinet meeting would have been to ensure the exercise of an independent assessment and judgment on the justifications for the request for the issuance of the government guarantees to secure the financing to SRC by KWAP.

[276] For the avoidance of doubt, it is not the overarching control which the accused wielded over SRC that per se translates into the interest under s 23 of the MACC Act. That is only the enabler, albeit a potent *sine qua non*. It is the private designs he had in respect of SRC, which was to use SRC for his personal advantage, as demonstrated above in the series of actions and decisions taken by him, made possible by his strong position of control, that renders his relationship with SRC into an interested one, in the nature that is caught under s 23 of the MACC Act.

The mental element of s 23(1) offence

[277] The mental element of the offence is satisfied by evidence of non-declaration of interest at the Cabinet meetings. For completion, I should add that under the law, on the evidence of the accused not declaring his interest during the two Cabinet meetings nor withdrawing from deliberation on the subject, the irresistible inference is that he had plainly intended not to disqualify or avoid a conflict of interest. This prohibited conduct on his part may be said to supply against the accused, the mens rea of the crime.

[278] This position in law was made clear in the decision of the Court of Appeal in *Datuk Sahar bin Arpan v Public Prosecutor* [2007] 1 MLJ 697; [2007] 1 CLJ 326 where the accused was charged for committing a corrupt act by using his public position for his pecuniary advantage. He did so by taking part in the meetings and decisions of the Melaka State EXCO in relation to three separate applications by a company in which he had an interest. Subsequently the sum of RM500,000 flowed into the bank accounts of the accused and his wife.

[279] Affirming the conviction of the accused by the High Court, the Court of Appeal also observed as follows:

> [9] *In addition to my analysis later in this judgment, it is uncontroverted that in his position as an EXCO member, the accused did attend the aforesaid EXCO meetings in which the aforesaid applications of Ivory Heights were deliberated and approved, and that the accused had neither declared his interest in Ivory Heights nor left the meetings.*
>
> [10] *The cumulative effect of the accused's conduct clearly evinces his intention not to disqualify or avoid a conflict of interest. The accused has indeed failed to divorce himself completely from the necessity of having to make the decisions: See the judgment of Abu Mansor bin Ali J (later FCJ) in Wong Voon @ David Wang Chang Vun v PP, Kota Kinabalu High Court, Criminal Appeal No 24 of 1994.*
>
> [11] *The accused's conduct clearly constituted the doing of an act forbidden by law, thereby supplying the mens rea against the accused.*
>
> [12] Illustrations of similar situations may be found in the case of a Melaka State EXCO member's participation in the deliberation of an application for State land in Alor Gajah which eventually benefited him and hence resulted in his conviction: *Haji Abdul Ghani Ishak*, supra, at p 231, which was affirmed by the Federal Court on appeal at p 248.
>
> [13] The physical presence of an accused who was an EXCO member at the relevant EXCO meeting which approved his application for land was sufficient in the circumstances for him to be regarded in law to have used his public position for his pecuniary advantage, and his silence did not make him any less an actor in the play, even when his application had already been duly processed and the land office has allotted to him a piece of land in the area earmarked for EXCO members, and the land committee had approved his application even prior to the EXCO's deliberation and approval: *PP v Dato Mohamed Muslim bin Haji Othman* [1983] 1 MLJ 245; [1982] 1 LNS 71 at p 248 (HC).

> [14] On the evidence adduced at the trial, I am of the view that the learned trial judge was correct in his finding that the accused had used his public position as an EXCO member and participated in the deliberation of and approval for all the three applications by Ivory Heights in the three EXCO meetings. (Emphasis added.)

[280] Similarly in the instant case, the accused attended and participated in the two Cabinet meetings on the guarantee for the financing to SRC, a matter in which he had an interest — his controlling interest in SRC that he used to his advantage, which he deliberately chose not to declare.

[281] I have earlier referred to the case of *Public Prosecutor v Dato Haji Mohamed Muslim bin Haji Othman* [1983] 1 MLJ 245 where on the issue of the mental element of the offence under s 2(1) of the Emergency (Essential Powers) Ordinance No 22 of 1970 which is not dissimilar in substance to the instant s 23 of the MACC Act, the High Court held that:

> Now the question of mens rea. I need only say that mens rea is necessary in every criminal offence save those which the Legislature thought fit to expressly exclude. But mens rea can be proved in diverse ways. Here mens rea is proved if the accused knew or ought to have known of the conflict between his public duty as member of the Exco and his private interest in the approval of the application.

[282] The accused knew about his controlling interests in and private designs on SRC. He did not prevent the conflict of interest at the two Cabinet meetings on the matter of the government guarantees. His failure to declare his interest gives rise to the inference on his criminal intention to commit the offence under s 23(1) of the MACC Act.

Whether the accused's involvement at Cabinet meetings on guarantees for financing to SRC is presumed to be in violation of s 23(1) of the MACC Act given the accused's interest in SRC

[283] It has been shown that the accused participated in the decision-making process at the meetings of the Cabinet which the accused chaired where the two government guarantees for the loans extended by KWAP to SRC were approved. This clearly is a decision or action, at least on two occasions, taken by the accused in relation to the government guarantee which was to guarantee KWAP the repayment of the loan by SRC, in which the accused had an interest of a nature that is caught under s 23 of the MACC Act.

[284] In fact the accused himself, as the Prime Minister who chaired the meetings, had tabled the Cabinet paper on the second government guarantee at the meeting which approved the same on 8 February 2012. There was no

disclosure let alone any attempt to excuse himself from the deliberation on the Cabinet papers at the either of the said meetings. The mental element of the accused has thus also been established.

[285] The accused knew or ought certainly to have known of the conflict between his public duty as the Prime Minister and Finance Minister on the one hand and the exercise of his controlling interest in SRC to his personal advantage on the other hand when the Cabinet considered SRC's application for the two government guarantees.

[286] Accordingly, on the evaluation of the totality of such evidence, I cannot but readily find that the question as to whether the decision made or actions taken by the accused was in relation to any matter in which he had an interest can only be answered in the affirmative. This therefore means that the presumption under s 23(2) of the MACC Act applies to the effect that and the accused is thus legally presumed to have used his office or position for gratification.

[287] In any event given the applicability of the presumption under s 23(2) upon the fulfilment of the requirements therein that the accused had taken action on a matter which involved his interest, it is already presumed that the accused had used his position for gratification. It is for the accused to rebut the presumption. On the totality of the evidence at the end of the prosecution case, this has not been achieved by the defence.

Other issues raised by parties in submissions at the end of the prosecution case

The element of gratification in s 23(1)

[288] In view of the invocation of s 23(2) which now presumes that the accused had committed the offence of using his office for gratification under s 23(1) by reason of the evidence of the accused having taken action and made decision at the two Cabinet meetings as specified in the charge on the matter (the guarantee for the financing to SRC) in which he had an interest, it is unnecessary therefore at the end of the prosecution stage to determine whether the element of gratification in s 23(1) is proved. It is in fact unnecessary even to prove receipt of gratification because that is not an ingredient of the offence under s 23(1). The offence is about the abuse of position perpetrated to obtain gratification. Actual receipt of any gratification however is a relevant fact.

[289] Nevertheless, I should for completeness make some mention of this element. This would further complement the maximum evaluation of all evidence adduced at this trial at the end of the prosecution case.

[290] Did the accused receive any gratification? Section 3 of the MACC Act defines gratification widely as:

'Gratification' means —

(a) money, donation, gift, loan, fee, reward, valuable security, property or interest in property being property of any description whether movable or immovable financial benefit, or any other similar advantage;

(b) any office, dignity, employment, contract of employment or services, and agreement to give employment or render services in any capacity;

(c) any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part;

(d) any valuable consideration of any kind, any discount, commission, rebate, bonus, deduction or percentage;

(e) any forbearance to demand any money or money's worth or valuable thing;

(f) any other service or favour of any description, including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted, and including the exercise or the forbearance from the exercise of any right or any official power or duty; and

(g) any offer, undertaking or promise, whether conditional or unconditional, of any gratification within the meaning of any of the preceding paragraphs (a) to (f);

[291] The receipt of the monies in the accused's Account 880 and Account 906 in the amount of RM42m which originated from SRC, as will be discussed later, shows the evidence of the money trail. Such monies is plainly under item (a) of the definition of gratification under s 3, and is therefore a form of gratification.

[292] The money trail and flow of funds evidence also recorded the utilisation of the RM42m by the accused himself, for purposes which benefitted him and for his advantage (see further the discussion on this in the section on the three CBT charges).

Whether the accused never gave instructions, but mere requests instead

[293] The argument that the accused had not given any instructions or directions but merely made requests and had no role to play in securing the loans from KWAP cannot withstand scrutiny. Even if these were couched as mere requests it is manifest that they were made by the accused because they were meant to be obeyed. Everyone else in the picture was in a position

A subordinate to the accused. These included the Secretary General of the Treasury and the Second Finance Minister.

B **[294]** To name and reiterate only a few; first, the accused did write to the CEO of KWAP (PW38) on the SRC letter (P364) (hand delivered to PW38 by the principal private secretary of the accused outside office after official working hours) that the accused agreed with SRC's financing request. PW38 testified, as stated earlier, that even though she was not legally compelled to follow such minute by the accused, she could not say there was no influence, acknowledging that the accused as the Prime Minister and the Finance C Minister was her 'ultimate boss'.

D **[295]** Secondly, the accused told her superior, the Chairman of KWAP and its investment panel who was also the top civil servant in the Ministry of Finance (PW45) to expedite the financing approval process and that the amount of RM2 billion would suffice (after the accused was told by PW45 and PW38 that the investment panel had decided on RM1 billion financing only, pending submission by SRC of documents as requested). PW45 did testify that he did not construe that as a directive from the accused but at the same time admitted E in his witness statement that the investment panel would not have agreed to the amount of RM2 billion for the first financing if not for that communication from the accused as the Prime Minister.

F **[296]** Thirdly, the accused told PW45 to let KWAP release the additional RM2 billion financing to SRC even before the formal guarantee document was delivered to KWAP as security for the financing.

G **[297]** There are other evidence of the involvement of the accused as detailed out earlier, but suffices that I state that it is not inaccurate to say that the internal processes at KWAP and MOF were generally followed to ensure that decisions were taken in accordance with the law, rules and regulations. The decision making authorities could have rejected the financing and guarantee applications. But they did not. The original request to KWAP was RM3.95 H billion. But KWAP investment panel approved in 2011 only RM2 billion (after that intervention by the accused).

I **[298]** And in 2012 another RM2 billion was approved, this time on account of KWAP being told by SRC that the Minister of Finance had, as recorded in the minutes of the investment panel meeting 'approved and advised for the Additional Facility to be procured from KWAP as KWAP is the financier to the Original Facility'. Even the terms of the second financing were conveniently made to follow those of the first.

[299] Further, the application by SRC to KWAP for the second financing was preceded by the Cabinet having already approved the government guarantee for the second financing of RM2 billion. And unmistakably the end result is that KWAP had extended a total financing of RM4 billion to SRC. This is actually more than the original request of RM3.95m financing from KWAP.

[300] It is on evidence incontrovertible that the said RM4 billion financing would not have been approved by KWAP investment panel if not for the government guarantees. That is absolutely key. Whether it was justified for the investment panel to have relied on the government guarantees without, it seems, clearly establishing the repayment capability of SRC as the borrower to KWAP is a different issue altogether. Members of the investment panel are subject to s 14(1)(d) and (e) which, as set out earlier, mandates the investment panel to invest in loans 'in terms remunerative' to KWAP. This is a heavy responsibility because s 14(3) of the same Act clearly states that any person who causes moneys to be invested in contravention of this provision shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding RM2m or to imprisonment for a term not exceeding ten years or to both.

[301] Whatever purported requests or expressions of agreement made by the accused, given his position and under the circumstances of the case these had unsurprisingly been construed as a form of instruction or directive or otherwise expected to be obeyed. In the final analysis, all that had happened — especially the expedited approval of the financing of the total RM4 billion by the investment panel, the hasty preparation of MJM for the Cabinet meetings for the approval of the two government guarantees, the subsequent approval of the same by the Cabinet, the reversal of the approval of the investment panel that the second financing be drawn down in tranches, the early disbursement of that second financing to SRC by KWAP without KWAP having received the formal guarantee could all not have occurred in the manner that transpired, or at all, if not for the stated involvement of the accused who then held the position of the Prime Minister and the Finance Minister of the country.

[302] This finding is entirely in consonance with the decision in the case of *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1 where the High Court ruled that the test to determine whether a request amounted to a directive or instruction was whether the act done would have been done or done effectively if the person in question were not the kind of member or in the position that he was and such that the officers felt compelled to comply. The relevant parts of the judgment reads as follows:

> A direction is therefore something that is stated authoritatively. Whether I tell my secretary: 'Please type this notes of evidence' in a calm and polite voice or utter the same words in a loud and commanding tone, it still amounts to a direction as she is compelled to obey it. Thus the tone in which a direction is given becomes irrelevant

where the person whom it is given is compelled to obey it. A direction can therefore be communicated in the form of a request, suggestion, instruction, or in any other manner provided that there is a compulsion to obey it. As a matter of fact, a perusal of the notes of evidence reveals that Dato' Mohd Said had used the words 'asked', urged', 'wanted', 'told' and 'instructed' to describe the communications between him and the accused. The communications from the accused to Dato Mohd Said and Dato Amir Junus would therefore amount to a direction if they felt compelled to obey them.

The defence argued that in order to say that the accused had used his public position to his advantage in respect of the four charges, he must have had authority over the Special Branch in law to direct them. If he did not have that authority, he would not have had the power to direct Dato' Mohd Said and Dato' Amir Junus in matters pertaining to the performance of their duties. The defence referred to their evidence where they said that at all material times, they were only responsible to the IGP and the Minister of Home Affairs. There was no evidence to show that they were responsible to the accused in his capacity as the Deputy Prime Minister or as the Minister of Finance. Accordingly, it was contended, the words '… in his capacity …' in s 2(2) of the Ordinance No 22 refers to a capacity to exercise power. I have already considered the law relating to this argument in some detail in an earlier part of the judgement. In substance, the view that I have expressed is that the 'capacity' in s 2(2) of Ordinance No 22 must not be equated with 'duty'. The true test would be whether the act done would have be done or could have been effectively done if the person in question were not the kind of Member that he in fact was. If the answer to the question is in the negative, then the act of the Member is one that was done in his capacity as such Member whereby he has used his public office for his advantage, provided that it could not be equally easily have been done by any person not holding that office.

[303] It is of interest to observe that in *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)*, from the above passage, the defence had advanced the argument that the senior police officers could not have been compelled to follow the request by the accused because they were answerable to the Inspector General of Police and the Minister of Home Affairs, and not to the accused's position as Deputy Prime Minister and Finance Minister. This was rejected by the court, ruling instead the test was whether the act done could have been effectively done if the person in question were not occupying the kind of position that he in fact was.

[304] As such the context on the basis of the subordinates perceiving the requests and agreements as directives and instructions in the instant case before me is much more compelling. For two reasons. First, this is because as is all too clear by now, in the instant case before me, the individuals to whom the accused communicated his 'requests' and 'agreements' were manifestly his subordinates in his position as the Finance Minister.

[305] PW38 was appointed as CEO of KWAP by the Finance Minister under

s 6(4) of the Retirement Fund Act 2007. As was PW45, being the Chairman of KWAP and its investment panel. PW45 at the same time also was the highest ranking civil servant in the MOF, reporting directly to the Finance Minister. PW56 as the Second Finance Minister also reported to the Finance Minister. He also reported to the accused as the Prime Minister as the leader of the Cabinet of Ministers.

[306] Secondly, applying *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* where the test was met even though the police did not answer to the accused by virtue of the accused's position as the Deputy Prime Minister, in the instant case, the fact that the accused was then the Prime Minister of the country means that the test is easily satisfied in respect of such 'requests' and 'agreements' expressed by the accused, given his unquestioned position as the chief executive of the nation.

[307] This controlling influence by the accused permeated down in the affected public institutions. For instance PW29 of KWAP was clear in his evidence on the basis of the approval for the financing which was the very notation by the accused on the SRC letter (P364). PW41 and PW43 of MOF testified the preparation was rushed because of requested by the accused. It bears emphasis that the former even said she was told that SRC was, in her words 'the PM's company'.

[308] In this regard, the decision of the former Federal Court in the case of *Haji Abdul Ghani bin Ishak & Anor v Public Prosecutor* [1981] 2 MLJ 230 is instructive. The facts are also stated in the following key passages of the judgment of Raja Azlan Shah CJ (as HRH then was):

> We concede that *the facts on which the learned judge relied for the convictions were largely circumstantial. But there was also direct evidence in the case of the first appellant that he participated in the deliberation of the Melaka Executive Council (Ex Co) meeting held on October 2, 1974* when the meeting considered the application of Kipah bt Othman (PW27) for 500 acres of state land for the purpose of prawn hatching. This direct evidence was by his colleagues in the Ex Co PW19, Hj Abdul Aziz bin Hj Alias, PW21, Datuk Yeaw Kay, and PW22, Datuk Mohamed Din bin Abdul Ghani.
>
> ...
>
> *The evidence revealed that a number of events happened on or about the month of January 1974 relating to a proposed prawn hatchery business and an application for state land culminating in the Melaka Ex Co meeting of October 2, 1974 and the subsequent formation on March 20, 1975 of a company called Syarikat Samasetia Sdn. Bhd. to undertake the business of prawn hatching on the land concerned.*
>
> ...

A In Melaka itself certain events pertaining to a land application also took place around the same period. According to PW5, Stanley Gui (a Settlement Officer in the District of Melaka Tengah) sometime in January 1974 in the morning the first appellant came to the Land Office in the District of Melaka Tengah and wanted to see a plan (exh P6). After looking at the plan the first appellant said he wanted a copy B of the plan and was given one after paying the necessary fee. Soon thereafter this witness saw the first appellant again but this time in the office of the assistant district officer (PW7). The first appellant was then in the company of a young lady Kipah bt Othman, aged 19 years, (PW27). This was on March 2, 1974.

...

C In fact evidence showed that on February 23, 1974 the second appellant drafted a letter (exh P6) and requested Kipah bt Othman, PW27, who was his niece, to type it and sign it in her name (exh P6A). This letter was dated February 23, 1974. *Apparently the letter was sent immediately to the office of the Chief Minister then who, as shown on the top of the letter, immediately directed the District Officer Alor Gajah to* D *forthwith process the application 'as soon as possible'. It is pertinent to note that this written minute of the Chief Minister was also dated February 23, 1974, ie, the same day as the application. Then significantly, exactly four days later, on February 27, 1974, with an efficiency perhaps unheard of in the history of land administration in this country, the assistant district officer wrote to Kipah bt Othman asking her to be present* E *at his office in connection with the application (exh P6A).* It was in response to this letter of the Assistant District Officer that on March 2, 1974 Kipah and the first appellant travelled together in the first appellant's car from Masjid Tanah to Alor Gajah Land Office to fill up an application form (exh P6C) and the questionnaire form (exh P6F) both in connection with the same application for state land. *After* F *this the government machinery in relation to this land application again moved with undue haste, Thus it was possible for the Ex Co paper to be prepared in time for its meeting on October 2, 1974 to consider the application for land by Kipah bt Othman. If we may digress, public authorities have acquired a reputation for being ponderous giants whose administrative processes cannot be hurried.* It is public knowledge that the administrative process required for an application for a piece of land leading up to G the preparation of the necessary Ex Co paper normally takes quite a considerable time, sometimes it may even stretch up to two to three years. This process was in fact explained by the Principal Assistant Secretary (PW20) in his evidence.

...

H *Anyone looking at the evidence would come to an irresistible conclusion that the application by PW27 was certainly not treated as an ordinary application for land for the whole machinery of the administration from the highest level of the Chief Minister to the lower level of the Settlement Officer seemed to be in top gear throughout.*

From the evidence of the witnesses who were present at the Ex Co meeting on I October 2, 1974 it would also seem clear to us that despite one or two objections the application was approved without much consideration. (Emphasis added.)

[309] I am inclined to agree with the submission of the prosecution that the facts in that case bear some close resemblance to those of the instant case before

me, in a number of respects. In the instant case, it is mainly about the request for financing by SRC from KWAP. The accused in this case too wrote a minute on the SRC letter to the potential lender KWAP's own CEO (PW38) in terms which were more explicit and prescriptive than like in *Haji Abdul Ghani bin Ishak & Anor v Public Prosecutor* which only was to get the application processed as soon as possible.

[310] Here, the accused told PW38 in writing that the accused agreed with the proposal. The need to have it processed as soon as possible is manifested in other evidence. These include, as stated earlier, that SRC letter being hand-delivered to PW38 by the accused's principal private secretary at a hotel outside office hours, and that the accused himself told PW45 to expedite the same, as recorded in the relevant minutes of the investment panel, given the update by PW38 to the investment panel to such effect, as well as the Chairman of KWAP (PW45) being told by the accused to let KWAP release the second financing of RM2 billion to SRC before the guarantee document was given to KWAP by MOF.

[311] Like in *Haji Abdul Ghani bin Ishak & Anor v Public Prosecutor* the government and public machinery involved in the two financing requests, namely KWAP and MOF too proceeded with undue haste, even to the extent where, as stated more than once before, in relation to the second loan, the monies were released even prior to the guarantee being formalised and thereby exposing KWAP to the credit risk of its lending being unsecured. This demonstrates that in his involvement in the granting of the two government guarantees, the accused could not have acted in the best interest of either KWAP or the Government of Malaysia ('MOF').

[312] At the same time, just like in *Haji Abdul Ghani bin Ishak & Anor v Public Prosecutor* it was plain to all that the financing request and the government guarantee application were far from being treated like any other ordinary application. The witnesses from KWAP and MOF readily testified to such effect, as has been shown earlier.

[313] The accused had overarching control of SRC and with that treated SRC as an entity that could be used to his personal advantage and private benefit. This was in consonance with the overriding and whole motive of the accused in his active and personal involvement in the approval processes at KWAP and MOF, and beyond. In short, it is irresistible that the decision made or actions taken was clearly in relation to a matter in which the accused had an interest, in violation of s 23 of the MACC Act. As such, the presumption under s 23(2) of the MACC Act applies and the accused is therefore presumed to have used his office or position for gratification.

[314] It bears repetition and emphasis that, considering government bureaucracy, it was extremely unlikely if not impossible for the financing by KWAP, the rushed preparation of the government guarantees for the Cabinet meetings, the approval of the guarantees by Cabinet, the decision to reverse the approval of KWAP on the second financing which had initially imposed the condition for the financing be released to SRC progressively as opposed to by way of one bullet drawdown, the early drawdown of the second loan without KWAP having received the government guarantee, among other things, would have been effected and pursued in the fashion that transpired if not for the conduct and involvement of the accused who was the Prime Minister and Finance Minister at the material time.

[315] As such the argument that the accused was merely expressing his requests and agreements which did not amount to an instruction or directive cannot be sustained.

Whether s 23(4) applies such that there is no violation of s 23(1)?

[316] The defence submitted that the charge under s 23(1) cannot be sustained because s 23(4) applies to this case. This provision reads:

> (4) This section shall not apply to an officer who holds office in a public body as a representative of another public body which has the control or partial control over the first-mentioned public body in respect of any matter or thing done in his capacity as such representative for the interest or advantage of that other public body.

[317] This provision contemplates two public bodies. The accused must be shown to be holding office in the first public body as a representative of another public body. That second-mentioned public body controls the first mentioned public body. And the matter done by the accused as the representative must be for the advantage of the second public body.

[318] Was this the scenario that unfolded in the instant case? The defence merely emphasised that the accused was an officer in one public body which the defence identified as the government. That much is true, but how does this relate to s 23(4)?

[319] In my view s 23(4) could only be validly applied to the facts in this case by contending that the accused was an officer of SRC as the first public body, representing the second public body which is the Government of Malaysia (since through MOF Inc it owned 1MDB, the sole shareholder of SRC when the first guarantee was approved, and later directly through MOF Inc as the sole shareholder of SRC at the time of the approval of the second guarantee by the Cabinet), and that the actions in question as taken by the accused must

have been for the advantage of the government, the second-mentioned public body which controls SRC. Only in that particular narrative could s 23(4) be invoked to deny the charge under s 23(1) against the accused.

[320] Was the accused an officer in SRC and the representative of the government? Clearly he was not an officer. He was involved because the Prime Minister was granted with special powers in the M&A of the company. That cannot be translated as the accused being an officer of SRC. Nor can his role as the shareholder of SRC be construed as an officer of SRC.

[321] At the same time there is no evidence of the accused having been appointed by the Government of Malaysia to be its representative at SRC. There is no evidence who directed Nik Faisal to insert the provision empowering the Prime Minister in articles 67, 92 and 116 in the M&A of the company. But the accused did exercise such powers, like that appointing the directors of SRC, raising the inference that he had at least consented to the inclusion. The creation of the position of advisor emeritus too in article 117 was approved by the accused himself as Prime Minister, as did MOF Inc. being the direct shareholder of SRC resulted from the accused's consent, if not direction.

[322] In any event, I reiterate that even if all these decisions or self-appointment by the accused could be deemed as that of the Government of Malaysia, it is still doubtful whether any of this representative capacity made him an officer of SRC.

[323] Notwithstanding all that, the complete answer to the defence's submission on this issue is that s 23(4) cannot apply in this case because it has not been shown that the actions taken by the accused which led to the decision by the Government of Malaysia to grant the two government guarantees in favour of the financing to SRC was done in the interest or the advantage of Government of Malaysia.

[324] On the totality of the evidence, it could not be said that the matter done by the accused, including his participation at the two Cabinet meetings approving the guarantees in his capacity as such representative was for the interest or advantage of the government.

[325] It simply could not have been, for the various reasons that have been alluded to earlier, chief among which I will in summary repeat only seven. First, the government guarantees were to secure the RM4 billion financing extended to a newly established company with no track record or relevant experience in relation to the extraction, processing, logistical services and trade of natural resources.

[326] Secondly, this massive financing of RM4 billion was made possible after a RM3 billion grant request was declined by the EPU who had suggested that funding should be sourced from the commercial banks or the capital markets, to avoid unnecessary exposure to the government, but only for the accused to ask KWAP, a public pension fund, to provide the RM4 billion financing to SRC.

[327] Thirdly, the Cabinet papers and the MJM were prepared in a rushed manner without sufficient evaluation where even the information on SRC and its future plans could not be properly verified.

[328] Fourthly subsequent to the drawdown of the loans to SRC, despite it being a matter within the remit of the management of the company, the accused as MOF Inc issued shareholder resolutions such as D534 as well as P501 and P530 on the subject of the deposit of the funds of SRC outside the country, which had absolutely nothing to do with the justifications for the financing stated in the Cabinet and KWAP investment panel papers, namely for the extraction, processing, logistical services and trade in natural resources.

[329] Fifthly, unsurprisingly, SRC failed to service its debts to KWAP and required funding from the government to avoid the declaration of an event of default by KWAP, necessitating a further three short term loan facilities totalling about RM650m to pay for the interest on the RM4 billion financing. The loans were never repaid by SRC, and the government has been honouring its guarantees by periodic payments to KWAP.

[330] Sixthly, the attempt by PW56, the Second Finance Minister to travel to Switzerland to verify the status of the funds of SRC in BSI Bank allegedly frozen by the Swiss authorities was denied by the accused.

[331] Seventhly, RM42m from SRC found its way into two of the accused personal bank accounts in 2014 and 2015, and promptly utilised by the accused for his personal benefit (this will be analysed with greater granularity in the section on the three CBT charges).

[332] Evidence also shows that SRC was not just like any other MOF Inc companies. Unlike most others, SRC was under the control and direction of the accused from day one. Even upon the incorporation of SRC, and before 1MDB and MOF Inc became the shareholder of SRC, the accused already wielded considerable powers in SRC in view of articles 67 and 116 of the articles of association of the company which conferred on the accused as the Prime Minister the authority on the appointment and removal of directors as well as on any amendment to the memorandum and articles of association of SRC.

[333] And later the accused, this time in his capacity as the MOF Inc moved to further solidify his controlling position by causing the insertion of article 117 making the Prime Minister the advisor emeritus of SRC, whose advice must be sought on key matters. The overarching powers in the M&A and as its sole shareholder had the effect of making the accused the ultimate decision maker in SRC, where nothing of importance could be decided by SRC without the input or knowledge of the accused.

[334] The involvement of the government machinery, in particular the MOF in overseeing its ownership and investments in MOF Inc companies on matters concerning SRC was however far from apparent, if almost non-existent and evidence from Datuk Fauziah Yaacob (PW53) a then Deputy Secretary General of the Treasury and the former Second Finance Minister (PW56) instead shows that attempts to assert oversight over SRC never succeeded. In stark contrast however, the accused's personal involvement and interventions in the name of either the Prime Minister or the Finance Minister on SRC matters with the assistance of Nik Faisal, the CEO & director of SRC (and concurrently the mandate holder for his three personal Am-Islamic Bank accounts), were disproportionately and glaringly both pervasive and imperious.

[335] That these involvement and interventions reflect the presence of the accused's own private vested interest in SRC is manifest.

[336] Further, apart from the initial assessment by the EPU which was generally supportive of the establishment of SRC to further fortify the nation's energy sector, the EPU did not support the request for the RM3 billion grant to set up SRC. There was no other evidence of any discussions or analyses by any governmental department or agencies on the need to support or promote SRC.

[337] There was simply no basis for the government to go out of its way to assist SRC, a newly established company with no proven track record, by issuing two government guarantees and in the process which was described as being rushed and expedited, facilitated the granting of financing to SRC from the country's pension fund in the aggregate colossal amount of RM4 billion, merely because the company's objectives are consistent with the energy requirements of the country as outlined in the 10th Malaysia Plan and the National Energy Policy. However there is paucity of evidence as to for what purposes the RM4 billion had actually been utilised for. What is clear however, is that SRC has defaulted on its loan repayments to KWAP.

[338] Given the above, under no circumstances could the action taken and decision made by the accused at the two Cabinet meetings be said to have been in the interest or for the advantage of the government.

The nexus between the RM42m gratification deposited into the personal accounts of the accused and the decision to grant the two government guarantees, and the time gap in between

[339] The charge specifies that the use of position was for the gratification of RM42m. This total sum of RM42m was transferred into two personal accounts of the accused (Accounts 880 and 906) on 26 December 2014 and 10 February 2015. Money trail evidence (see below the section on the three CBT charges) shows that the RM42m originated from SRC, albeit made to flow through two intermediaries, Gandingan Mentari Sdn Bhd ('GMSB') and Ihsan Perdana Sdn Bhd ('IPSB').

[340] It was from the latter that the RM42m was transferred to the accused's Accounts 880 and 906. Evidence also shows that the accused had knowledge that the RM42m came from SRC, and that the requisite knowledge can also be inferred from the proved facts, as will be further discussed later.

[341] Learned counsel for the accused maintains that it could not have been the case that the accused had acted corruptly in respect of the approval of the two guarantees in 2011 and 2012 in order to obtain the gratification which materialised a few years later in late 2014 and early 2015.

[342] I emphasise that when considering the law in s 23 of the MACC Act and the charge preferred against the accused for this offence, the factual matrix must be properly appreciated and the evidence must be viewed in totality. The interest of the accused in SRC must be seen in the correct context, which is from the time of the establishment of SRC on 7 January 2011, to the approval of the applications for loans by SRC from KWAP (on 19 July 2011 and 20 March 2012) which were guaranteed by the government (approved by the Cabinet on 17 August 2011 and 8 February 2012) until the time the monies being the property of SRC in the amount of RM42m were deposited in the bank accounts of the accused which evidence will also demonstrate eventually used by the accused for his personal interest and own advantage.

[343] In my view, the intention to obtain gratification in this case could be readily inferred from the circumstances, given the failure of the accused to avoid a conflict of interest position at the Cabinet meetings, supplying the criminal intention against him, in view of the case law authorities I mentioned earlier, particularly when it has already been shown that the accused had an

interest in SRC which he also controlled, the entity which was the subject matter of the decision to grant the government guarantees at the Cabinet meetings.

[344] The Cabinet approval of the guarantees made the loans to SRC possible. Given the accused's control over SRC, including his role in helping secure a massive RM4 billion financing from KWAP to SRC, by reason of the Cabinet approval which the accused participated in, the accused could at any time cause the transfers of the company's funds. This indeed happened in respect of the December 2014 and February 2015 transactions totalling RM42m which was transferred out of SRC, made to flow through GMSB and IPSB, and credited into his personal accounts at Am-Islamic Bank, all in a mere matter of days. This sum was utilised and expended by the accused to his own advantage. This is gratification to the accused pure and simple.

[345] Not only that. In addition, case law authorities have also held that a series of acts which are separated by intervals of time could still be held to have formed one transaction and deemed connected through being done with one specific criminal intent in the pursuit of a continuous plot. Similarly in this case.

[346] It bears emphasis that even though the charge mentions the accused's involvement in the decisions taken at the two Cabinet meetings on 17 August 2011 and 8 February 2015, as I have stated, s 8 of the Evidence Act 1950 mandates this court to consider conduct of the accused antecedent and subsequent to the specifics stated in the charge against him if such conduct influences or is influenced by any fact in issue or relevant fact. It has already been shown that the attendance at the Cabinet meetings was part of the requisite process central to the series of conduct on actions taken and decisions made by the accused concerning the financing to SRC by KWAP and the guarantee by the government for the repayment of the financing. This approach in the context of corruption cases is well in accord with case law authorities.

[347] The starting point is the establishment of SRC in early 2011 which provides the overall context on the existence of a premeditated scheme. The accused's participation in the Cabinet meetings in 2011 and 2012, given the series of actions and decisions vis a vis the involvement and interventions, was the act which amounts to the use of position for the purposes of obtaining gratification, which materialised when the RM42m was received by him in his Accounts 880 and 906 in late 2014 and early 2015.

[348] In the Federal Court decision in the case of *Public Prosecutor v Dato' Waad bin Mansor* [2005] 2 MLJ 101; [2005] 1 CLJ 421, barely three weeks

after its formation, a company made an application to develop its land for quarry operations. The application was presented to the District Land Committee for consideration. The accused had an interest in the company. He was then appointed as a member of that committee and participated in the decision to approve the application. Post approval, the company was sold, resulting in the accused and his wife receiving substantial cash payments.

[349] The Federal Court held relevantly that the various conduct of the accused vis a vis the charge must be viewed in the whole episode in its entirety. It was thus held:

> From the facts, the CA agreed that Teraju Nusantara was established on 4 November 1991, for one purpose and one purpose only ie, to secure the said land, the subject matter of the amended charges, for quarry operations. *The presence of the respondent's wife as the director of Teraju Nusantara was indeed a camouflage for the respondent's involvement in the said company*.
>
> Immediately three weeks after the formation of Teraju Nusantara ie, on 25 November 1991, an application was made by it to the Land Office Tampin to develop the said land for quarry operations. The application was processed by the Land Administrator of the District of Tampin for the purpose of presenting it to the District Land Committee for consideration. The respondent, being an ADUN, was appointed as a member of the said Committee.
>
> The working papers were prepared on 15 December 1992 and six days later, ie, on 21 December 1992, they were presented, considered and approved by the Committee with a positive recommendation to the MMK. *The respondent was present at the Committee's meeting.*
>
> *On 28 April 1993, the MMK approved the application of Teraju Nusantara to conduct quarry operations on the said land. The respondent, as a member, was once again present at the meeting.*
>
> *On 26 January 1994, the MMK approved Teraju Nusantara's application for an extension of time to pay the premium for the said land. Here again, the respondent being one of the members, was present at the meeting*.
>
> From the chronology of events that had taken place, it can be seen that the entire exercise ie, from the formation of Teraju Nusantara to the subsequent approval of its application for quarry operations, was done over a very short period of time.
>
> It must also be noted that the company was a RM3 company and the directors as such were not business oriented people with the necessary expertise in quarry works.
>
> *Against this background, we must say that the CA had, with respect, given very little attention to the insidious conduct of the respondent in respect of his role in the entire episode.*
>
> *It is our view that we should look at the conduct of the respondent right from the inception of Teraju Nusantara to its eventual sale in order to understand the corrupt intention.*

By merely focusing on the initial presence of the respondent at the various committee meetings in his capacity as the ADUN or member of the MMK, the CA, in our opinion, had viewed the offences in a very cursory manner. The effect of the respondent's conduct becomes more visible when viewed in its totality.

The presence of the respondent at the meeting of the MMK held on 26 January 1994, which deliberated on the extension of time for Teraju Nusantara to pay the premiums on the said land, was again part of his nefarious design which had not been adequately considered by the CA when assessing sentence.

...

We must reiterated that the respondent's role began with the inception of Teraju Nusantara. And concluded with the sale of it on 19 July 1994. Prior to the execution of the sale and purchase agreement, the respondent was paid RM 150,000 and his wife RM100,000. To our minds the role of the respondent stretched far beyond merely participating in the decision making process to the said land.

It is obvious from the facts that by his role in the entire episode, both the respondent and his wife had benefited financially.

From the sequence of events that took place ie, from the inception of Teraju Nusantara, the application and approval of the said land for quarry purposes and finally the sale of Teraju Nusantara, it is obvious that it was a well thought out scheme by the respondent. There is clear evidence of premeditation on his part to commit a corrupt act. It was not as though the offence was committed in a moment of aberration or on the spur of the moment.

The parts played by the respondent in his capacity as an ADUN and a member of the MMK in the series of meetings held to consider and approve the application of Teraju Nusantara for quarry operations show in no uncertain terms that financial advantage was foremost in the mind of the respondent. (Emphasis added.)

[350] The case of *Mohamed Ramly bin Haji Rasip v Public Prosecutor* [1941] 1 MLJ 31 is also another authority for the proposition that a series of acts that are separated by intervals of time may nevertheless be construed to form one transaction if they were connected with a single criminal intent for the furtherance of a continuous plot. It was held thus:

The following passage occurs in the judgment of Innes, JC:

> It seems to me that the series of acts enquired into though separated by short intervals of time, may well be held to have formed one transaction in the sense that they were connected through being done with one specific criminal intent for the furtherance of a continuous plot. Indeed the acts charged as cheating and criminal breach of trust had to be carried out before the employment of the forged delivery orders could be effectually resorted to.

[351] A related argument advanced by the defence is that the prosecution failed to prove the nexus between the gratification of the RM42 deposited into

A the personal accounts of the accused and the decision to grant the two government guarantees which he participated in, relying in particular on the High Court decision in *Thomas @ Severinus bin Kandadi v Public Prosecutor* [2009] 7 MLJ 803; [2009] 7 CLJ 561 which stands for the proposition that to prove an offence under s 15(1) of the now repealed Anti-Corruption Act 1997 B (which is identical to s 23(1) of the MACC Act) the evidence must show that the accused's intention when he undertakes the impugned conduct is to obtain a gratification.

C **[352]** In that case, the appellant, a public officer with the Beaufort Health Department, was found guilty by the sessions court of receiving a bribe of RM9,995 from a company, one AST Enterprise, an offence punishable under s 15 of the Anti-Corruption Act 1997. The quotation committee at the Beaufort Health Department awarded a project to carry out repair and D maintenance works for a health clinic in the locality to AST Enterprise. Later, in pursuance of this decision of the quotation committee, the appellant, as the chief clerk signed the requisite certification of the local purchase order ('LPO') to certify that the repair works for the fence had been satisfactorily carried out. This was however untrue as the project had not been completed. There was no E dispute that when the appellant signed the LPO he had done so under the instruction of the head of the department. Nevertheless, the prosecution submitted that three months after the appellant signed the said LPO, the appellant had received a RM9,995 cheque from the owner of AST Enterprise.

F **[353]** On appeal, the High Court identified the key issue for determination was whether the appellant had used his position for a gratification when he signed the said LPO and whether there was an abuse of position.

[354] The High Court held it was clear that the appellant was a public officer G attached to the Beaufort Health Department at the material time. Significantly, the High Court emphasised that the offence under s 15 is only committed when there is misuse or abuse of position and not otherwise, such that the evidence must show that the appellant's intention when he signed the LPO was to obtain a gratification from AST Enterprise. It was ruled however that when H the appellant signed the LPO, it was to follow up on the decision of the quotation committee and under the instruction of the head of department. Accordingly, on such facts, it could not be said that the appellant's act of signing the LPO was for the purpose of obtaining a gratification.

I **[355]** Now it is to my mind pretty clear that the factual matrix in that case is different from that in the instant case. This is despite the appellant there being charged under the same offence as the accused before me. There, the impugned conduct was the certification on the LPO made by the appellant. He had nothing to do with the decision of the quotation committee. As the chief clerk

he merely followed through on the decision of the former, on the instruction of his superior, the head of the department. In sharp contrast, in the instant case the accused participated and in fact chaired the two Cabinet meetings which in fact approved the government guarantees.

[356] The High Court in that case held that before criminal intent can be attributed to the appellant there must first be established a nexus between the RM9,995 and his alleged abuse of position. It must be proved that at the time the appellant signed the LPO, it was agreed that he would be given the RM9,995. In absence of such evidence there could be no question of any criminal nexus between the RM9,995 cheque and the appellant's act of signing the LPO. The appellant could not have had any personal interest as the decision to award the contract to AST Enterprise was not his decision. There was no evidence that before the appellant signed the LPO he had any dealings or discussed the project with the owner of AST Enterprise. The appellant had no interest in the firm. This made it imperative for the prosecution in that case to establish that when the appellant signed the LPO, he did it with the intention of obtaining the gratification that he was charged with.

[357] In the instant case, in contrast, the accused had every knowledge about the financing by KWAP and the necessity for the government guarantees. Evidence which shows his involvement in the process at KWAP and MOF is nothing short of overwhelming, as I have set out earlier. Also, in the instant case, there is no arrangement with any third party for the accused to be given gratification for his participation at the Cabinet meetings.

[358] In contradistinction, the accused had a controlling interest in SRC which he used for his personal advantage. As stated, he was in the dominant position of power and authority (as a shadow director and director under s 402A for the purposes of CBT, see below in the section on the three CBT charges) — as the one with the power to hire and fire the directors, amend the M&A, as the advisor emeritus who must be consulted, and as the sole shareholder in light of the true status of MOF Inc which enabled him by a series of conduct and action on his parts, to get the financing of RM4 billion approved for SRC, and for two government guarantees be issued by MOF to secure the repayment of the financing.

[359] The Cabinet approvals at the meetings he chaired allowed him to exercise his controlling powers for personal access to more funds of the company, including the RM42m which got debited out of SRC and eventually channelled into Accounts 880 and 906 of the accused. That establishes the presence of his criminal intention at the time he was involved in the two Cabinet meetings which approved the government guarantees for the aggregate

amount of RM4 billion — in that he would be able to gain access to any amount of funds of SRC which translated into the RM42m.

[360] At its core, the true source of this unusual arrangement on the consolidation of power vested into the person who was the accused was the very office of the accused as the Prime Minister of the country which made all other positions subordinate to him.

[361] As such, any decision on the guarantee for the financing to SRC would certainly benefit the accused as the true controller of the company, a vehicle which he controlled and used for his personal advantage. It therefore absolutely served the interest of the accused that SRC secured that massive financing from KWAP.

[362] The obvious lapse in time from the Cabinet meetings in 2011 and 2012 which approved the issuance of the government guarantees to secure the repayment of the financing of the total sum of RM4 billion by SRC to KWAP until the receipt of the RM42m in late 2014 and early 2015 is in this context inconsequential because the law as held by the case law authorities I have referred to would consider this as a single transaction.

[363] To hold otherwise would violate the legal position and constitutes a departure from basic logic and common sense. This is because potential violators could flagrantly abuse their office and conveniently delay the receipt of the gratification to a later juncture in order to escape criminal liability altogether.

[364] Viewed in that light, the establishment of SRC itself could have been an intentional, deliberate and calculated plan engineered by or at the behest of the accused for the furtherance of a continuous plot to misappropriate monies belonging to SRC for his personal benefit and advantage, which was accomplished by the transfer by IPSB in three tranches of an aggregate sum of RM42m belonging to SRC in the personal Am-Islamic banking accounts of the accused.

[365] It is not out of place to say that evidence allows this court to conclude that the entire episode reeks of a well-orchestrated scheme by the accused with the requisite premeditation on his part to commit a corrupt act, in pursuing the exercise of his control over SRC, to be used for his personal benefit, with financial gratification foremost in his mind.

Whether non-specification of the interest in the charge against the accused under s 23(1) renders the charge defective? A

[366] The defence argued that the charge is defective as it did not specify the interest that the accused had, which would have necessitated his withdrawal from participating in the Cabinet meetings on 17 August 2011 and 8 February 2012. The prosecution submitted that there is no legal requirement to specify the interest of the accused in the charge. B

[367] I agree with the submission of the prosecution. This is because the offence of using office or position for gratification under s 23(1) of the MACC Act, as set out earlier, does not make any mention of the word 'interest'. It is plainly not an element of the offence under s 23(1). But it is pertinent in the event the prosecution intends to rely on the legal presumption provided in s 23(2) of the MACC Act, like the case presently. C D

[368] As stated earlier, s 23(2) of the MACC Act states that when an officer of a public body makes any decision, or takes any action, in relation to any matter in which he has an interest, whether directly or indirectly, he shall be presumed to have used his office or position for gratification, unless the contrary is proved. In other words, in that context, it is for the prosecution to adduce the requisite evidence to demonstrate the interest in question with a view to invoking the presumption. The prosecution has done that. In my judgment, successfully. E F

[369] Neither is there basis to even suggest that the defence was in any manner prejudiced in his defence or had any problem understanding the charge, especially when the defence team spent considerable time in its extensive, intense and detailed cross-examination of the witnesses for the prosecution throughout the trial. G

[370] I also note that this objection was not raised in the defence's application to strike out all the seven charges which was heard and dismissed in the earlier stage of the trial. There is thus no basis in this contention. H

Whether there was already an agreement in principle by the MOF to grant security to the loans that SRC was about to obtain from KWAP

[371] The defence contends that there was already an agreement in principle by the MOF to secure the financing to SRC. I do not think that this contention is meritorious. On the evidence, at all material times, the security referred by the relevant witnesses was in relation to the government guarantee, and that the reference to Malaysian Government Securities ('MGS') in the KWAP investment panel paper (P372) was only in relation to the interest rates for the I

financing granted by KWAP to SRC. MGS was never an option to secure the financing. As stated in the said paper (P372) the context of MGS was on the interest rate — which was then proposed to be based on the 'floating rate of 10-year Malaysian Government Securities (MGS) plus 150 basis points to be reset annually'.

[372] Moreover, the minutes of the KWAP special investment panel at its meeting on 19 July 2011 (P417) resolved for the financing to be granted with the options of either KWAP to provide the financing to 1MDB with a guarantee from the government or for KWAP to provide the financing to the government, and for the government to then provide the financing to 1MDB. Certainly not MGS.

[373] Nor could there have been any agreement in principle by the officers of the MOF to provide SRC with a security for its proposed borrowing in the form of the guarantees. There is no evidence to such effect. And legally neither would that have been possible. Under the Loans Guarantee (Bodies Corporate) Act 1965 a government guarantee can only be given by the Minister of Finance as provided in s 2 of the Act. As testified by PW56, the Minister referred to in s 2(2) refers to the Minister of Finance. Section 2(2) is herein reproduced:

> (2) Any guarantee given under this section shall be given in writing in the name of the Government and the guarantee and any endorsement on any bond, promissory note or other instrument of any guarantee given under this section may be signed on behalf of the Government by the Minister or by any person authorized thereto in writing by the Minister.

[374] The defence then refers to the testimony of PW45 (notes of proceedings dated 10 July 2019 — PW45) as follows:

> S: So in other words, this is a situation where the decision on treasury side was made in principle at the investment panel meeting on the 19th July. Yes, because this considerations must have been way in your mind. Yes sir?
>
> J: Yes.

[375] However, the existence of the so called 'agreement in principle' by the Treasury is disputed by the prosecution, correctly in my view, since the above testimony was in relation to a KWAP investment panel meeting. Any decision to grant a government guarantee cannot under the law, as just stated, be made by anyone other than the Finance Minister.

[376] More so if the MOF official in question, like PW45, was also wearing a different hat as chairman of the investment panel at a forum that was a meeting

of the KWAP investment panel. Moreover it is extremely unlikely if not downright impossible for a governmental decision, let alone of this magnitude in importance, albeit *in principle* in nature, to have been made outside of MOF, on the basis of what PW45 could have been thinking of at the time.

[377] Again, there is thus also little substance in this argument of the defence.

Concluding observations

[378] The series of events which accompanied this narrative on the additional RM2 billion financing from KWAP to SRC, at the back of the government guarantee already approved by the Cabinet is especially telling in revealing the multiplicity of roles played by the accused, expressed tacitly when not overtly, which converge in the upper most objective to inject cash into SRC which evidence will show also benefited him personally.

[379] As if the fact that the Cabinet, chaired by the accused had decided on the second guarantee even prior to SRC submitting its second loan application to KWAP is not unusual, evidence shows that it was the accused, who by resolving as the shareholder for SRC to seek the financing was for all intents and purposes telling the investment panel to grant the second financing to SRC, secured by another guarantee which like the first was pursued by him as the Finance Minister, resulting in the tabling of the MJM at the Cabinet meeting. The financing was also, at the behest of the accused, drawn down even before KWAP received the government guarantee from MOF. At the Cabinet meeting on 8 February 2012, like the previous one on the first guarantee, no disclosure was made by the accused of his involvement and interest in SRC.

[380] It is true that the fact that SRC is owned by MOF Inc was stated in the MJM in respect of both meetings. And members of the Cabinet must be assumed to be aware that MOF Inc is essentially the Finance Minister. But the key point here, which distinguishes SRC (and 1MDB) from many other MOF Inc's owned entities, and which exhibited an interest on the part of the accused in SRC which ought therefore to have been disclosed, is threefold.

[381] First, the M&A of SRC contained provisions vesting the authority to appoint and dismiss members of the board of directors of the company or to approve any changes to the M&A to the Prime Minister. In addition, the accused also approved a new article 117 to make the Prime Minister as advisor emeritus of the company. These provisions are unusual for MOF entities which are already controlled by MOF Inc as the shareholder.

[382] It is no doubt correct, as learned lead senior counsel highlighted to the court that the powers of the Prime Minister are similarly found in the

A legislation which formed Petronas, the national oil company. However, Petronas cannot by any standard be compared with SRC. Petronas was established to manage and develop the country's significant oil and gas reserves. SRC was set up to manage alternative energy sources and was still exploratory at the time of its set up.

B

[383] As I have emphasised there is no evidence that the setting up of SRC was properly examined with feasibility studies given the lack of any governmental papers or minutes of discussions on the subject. It is undisputed that the objectives of SRC accorded with the energy requirements of the nation as C stated in the 10th Malaysia Plan and the National Energy Policy.

[384] But it was that three-page letter from 1MDB which PW28 of EPU evaluated that triggered the establishment of SRC. It was externally-driven. In fact, 1MDB's proposal in wanting to promote SRC overlapped in some D respects as discussed earlier with the role of Petronas. This demonstrates a clear disconnect with the government's position on the matter. This was identified by PW28 whose recommendation in the EPU memorandum that SRC not venture into areas covered by Petronas was duly agreed to by the accused.

E

[385] And as it turned out, as agreed to by the former Secretary General of the Treasury and Chairman of KWAP (PW45) as well as its Investment Panel, despite the RM4 billion financing, SRC has nothing to show for, other than its repeated failure to adhere to its financing commitments to KWAP. In huge F contrast, Petronas was rightfully the initiative of the government. It is now a global energy and solutions company, ranked amongst the largest corporations in the world on Fortune Global 500. Even its incorporation resulted from an Act of Parliament, unlike that for SRC which was driven by Nik Faisal as the M&A of SRC shows.

G

[386] Secondly, the extent of the active and personal involvement of the accused in terms of the series of actions taken and decisions made in the process of the establishment of SRC, its funding (which involved KWAP, the pension fund reporting to the Finance Minister), the guarantee by the government that H made possible the financing (arranged by MOF of which he was Finance Minister), the Cabinet approval (which meetings he chaired without any disclosure of interest), the transfer of SRC's ownership directly to MOF Inc is unparalleled. No suggestion was made that the accused had ever got himself involved in any other MOF Inc-owned entity even half or any lesser of the I degree of active involvement shown by him in respect of SRC (with the possible exception of 1MDB).

[387] Thirdly, unlike for all other companies and entities owned by MOF Inc which are supervised and monitored by the BMKD at the MOF, evidence

shows, particularly from the testimonies of PW53, a former deputy Secretary General at MOF and PW56, the former Second Finance Minister, Nik Faisal and SRC were not compliant and failed to cooperate even in submitting the company's financial statements to BMKD. Not only was effective monitoring lacking if at all it existed, due to such blatant lack of cooperation (never mind respect), attempts by BMKD to reign in SRC were similarly unsuccessful, if not altogether impeded.

[388] The reason is the accused's overarching position of control in SRC. PW56 himself was refused permission by the accused to travel to Switzerland to determine the actual status of the funds of SRC at BSI Bank in Lugano, and was specifically told not to get involved in matters related to SRC and 1MDB. No other MOF Inc companies were shown to have been treated in this unusually protective fashion by the accused as the Prime Minister and the Finance Minister.

Decision on the charge under s 23 of the MACC Act at the end of the prosecution case

[389] Accordingly, it is my judgment that after having conducted a maximum evaluation of all credible evidence made available before this court, I find that the elements of the offence of using position for gratification under s 23(1) of the MACC Act have all been proved by the prosecution, by way of the application of the presumption under s 23 (2) such that a prima facie case in respect of the charge against the accused under s 23 of the MACC Act has been established.

THE THREE CRIMINAL BREACH OF TRUST CHARGES UNDER S 409 OF THE PENAL CODE

The law and the charges

[390] It is first apposite that s 409 of the Penal Code be stated in its entirety, as follows:

> 409 Criminal breach of trust by public servant or agent
>
> Whoever, being in any manner entrusted with property, or with any dominion over property, in his capacity of a public servant or an agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for a term which shall not be less than two years and not more than twenty years and with whipping, and shall also be liable to fine.

[391] The term 'criminal breach of trust' is defined in s 405 of the Penal Code, the entirety of which reads as follows:

405 Criminal breach of trust

Whoever, being in any manner entrusted with property, or with any dominion over property either solely or jointly with any other person dishonestly misappropriates, or converts to his own use, that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits 'criminal breach of trust'.

ILLUSTRATIONS

(a) A, being executor to the will of a deceased person, dishonestly disobeys the law which directs him to divide the effects according to the will, and appropriates them to his own use. A has committed criminal breach of trust.

(b) A, is a warehouse-keeper. Z, going on a journey, entrusts his furniture to A, under a contract that it shall be returned on payment of a stipulated sum for warehouse room. A dishonestly sells the goods. A has committed criminal breach of trust.

(c) A, residing in Kuala Lumpur, is agent for Z, residing in Penang. There is an express or implied contract between A and Z that all sums remitted by *Z* to *A* shall be invested by *A* according to *Z*'s direction. *Z* remits five thousand ringgit to *A*, with directions to *A* to invest the same in Government securities. *A* dishonestly disobeys the directions, and employs the money in his own business. *A* has committed criminal breach of trust.

(d) But if *A*, in the last illustration, not dishonestly, but in good faith, believing that it will be more for *Z*'s advantage to hold shares in the Oriental Bank, disobeys *Z*'s directions, and buys shares in the Oriental Bank for *Z*, instead of buying Government securities, here, though *Z* should suffer loss and should be entitled to bring a civil action against *A* on account of that loss, yet *A*, not having acted dishonestly, has not committed criminal breach of trust.

(e) *A*, a collector of Government money, or a clerk in a Government office, is entrusted with public money, and is either directed by law, or bound by a contract express or implied, with the Government, to pay into a certain treasury all the public money which he holds. *A* dishonestly appropriates the money. *A* has committed criminal breach of trust.

(f) *A*, a carrier, is entrusted by *Z* with property to be carried by land or by water. *A* dishonestly misappropriates the property. *A* has committed criminal breach of trust.

Explanation — Upon any prosecution for any offence of criminal breach of trust, an employer who deducts the employee's contribution from the wages payable to the employee for credit to any employee fund, by whatever name called, established by any law for the time being in force, shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the

payment of such contribution to the said fund in violation of the said law, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law within the meaning of this section.

[392] The three charges (second amended charges) on CBT state the following:

The First Charge

> Bahawa kamu antara 24 Disember 2014 dan 29 Disember 2014, di AmIslamic Bank Berhad, Bangunan Ambank Group, No. 55 Jalan Raja Chulan, dalam Wilayah Persekutuan Kuala Lumpur, sebagai seorang ejen, iaitu Perdana Menteri dan Menteri Kewangan Malaysia, dan Advisor Emeritus SRC International Sdn Bhd ('SRC'), dan dalam kapasiti tersebut, diamanahkan dengan penguasaan ke atas wang milik SRC, telah melakukan pecah amanah jenayah terhadap wang sejumlah dua puluh tujuh juta Ringgit Malaysia (RM27,000,000.00), dan oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 409 Kanun Keseksaan (Akta 574).

The Second Charge

> Bahawa kamu antara 24 Disember 2014 dan 29 Disember 2014, di AmIslamic Bank Berhad, Bangunan AmBank Group, No. 55, Jalan Raja Chulan, dalam Wilayah Persekutuan Kuala Lumpur, sebagai seorang ejen, iaitu Perdana Menteri dan Menteri Kewangan Malaysia, dan *Advisor Emeritus* SRC International Sdn Bhd ('SRC') dan di dalam kapasiti tersebut, diamanahkan dengan penguasaan ke atas wang milik SRC, telah melakukan pecah amanah jenayah terhadap wang sejumlah lima juta Ringgit Malaysia (RM5,000,000.00) dan oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 409 Kanun Keseksaan (Akta 574).

The Third Charge

> Bahawa kamu antara 10 Februari 2015 dan 2 Mac 2015, di AmIslamic Bank Berhad, Bangunan AmBank Group, No. 55, Jalan Raja Chulan, dalam Wilayah Persekutuan Kuala Lumpur, sebagai seorang ejen, iaitu Perdana Menteri dan Menteri Kewangan Malaysia, dan *Advisor Emeritus* SRC International Sdn Bhd ('SRC') dan di dalam kapasiti tersebut, diamanahkan dengan penguasaan ke atas wang milik SRC, telah melakukan pecah amanah jenayah terhadap wang sejumlah sepuluh juta Ringgit Malaysia (RM10,000,000.00) dan oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 409 Kanun Keseksaan (Akta 574).

[393] It will be readily appreciated that the three CBT charges are identical to one another apart from the differences in the dates and amount of monies.

[394] From the formulation of the offence under s 409 of the Penal Code and as reflected in the three charges for CBT, the key ingredients that must be

established are first, the agency capacity of the accused, secondly that he was in that capacity entrusted with funds belonging to SRC, and thirdly, that the accused committed criminal breach of trust at the material time as specified. These will be examined in turn.

The ingredients of CBT — Whether the accused was an agent within s 409 of the Penal Code

The background to the requirement in respect of capacity of agent presently

[395] This is the first important issue for the prosecution to establish. The starting point is s 402A of the Penal Code which defines the word 'agent'.

[396] This definition, it ought to be stated, was introduced by the Penal Code (Amendment) Act 1993 and came about, as correctly highlighted by the counsel for the accused, due to the interpretation of the capacity of agents in the previous s 409 which the courts had held to apply only to 'professional' agents such as bankers, lawyers and brokers and did not extend to directors who are construed as 'casual' agents.

[397] This was made clear, for example, in the analysis by the Court of Appeal in the case of *Periasamy s/o Sinnappan & Anor v Public Prosecutor* [1996] 2 MLJ 557) on the application of the element of 'agent' under the former s 409. The previous law in that statutory provision, for completeness, is referred to in the following parts of the judgment of Gopal Sri Ram JCA (as he then was):

> The Case for the First Appellant (a) the charge of criminal breach of trust
>
> Prior to its amendment in 1993, s 409 of the Penal Code (FMS Cap 45) ('the Penal Code') read as follows:
>
> > Whoever, being in any manner entrusted with property, or with any dominion over property, in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney, or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to fine.
>
> The amendments made by Parliament to the section in 1993 have no application to these appeals as they came into force well after the alleged commission of the offences with which the appellants were charged.
>
> It may be seen at once that the section is in two parts. The first part applies in cases where there has been entrustment of property or its dominion to a person — to quote the words of the section — 'in his capacity of a public servant'. The second part of the section applies to cases of entrustment to a category of persons, including an agent — again to quote the section — 'in the way of his business'. Thus, the word 'capacity' applies to a public servant but not to an agent.

That the bifurcation we have alluded to existed in the section as it was previously cast was given judicial recognition by the (then) Supreme Court in *Yap Sing Hock & Anor v PP* [1992] 2 MLJ 714. Peh Swee Chin SCJ (as he then was) who delivered the judgment of the Supreme Court on that occasion made the following observation (at p 725 of the report):

> The modifying words 'in his capacity' refer to a public servant and the words 'in the way of his business' refer to 'banker, agent ...' Decided cases on the phrases do not necessarily apply to both situations provided by the two different phrases for one thing; and it could even lead to serious arguments in court.

In *Cooray v R* [1953] AC 407, the appellant was convicted of an offence under s 392 of the Penal Code of Ceylon which is in *totidem verbis* s 409 of our Penal Code. The charge recited that the appellant, Cooray, had been entrusted with certain money, 'in the way of his business as an agent'. On appeal to the Privy Council, the board, at the conclusion of arguments, allowed the appeal and substituted a conviction under s 389 of the Ceylon Code, which provision is identical to s 406 of our Code.

Later, when delivering the written advice of the judicial committee, Lord Porter made certain observations about the way in which the equipollent of s 409 is to be applied. We find it necessary to quote from his judgment at length.

After setting out the gamut of sections among which s 392 was to be found, his Lordship said (at pp 415–416):

> The question for Their Lordships, therefore, is in the first instance whether the appellant is a member of the class or one of the classes embraced in s 392, or otherwise included amongst those referred to in the section. It was held in the courts of Ceylon, and is maintained by the respondent, that the appellant was entrusted with property in the way of his business as an agent and converted it to his own use and consequently comes directly within the words of the statute. On the other hand, the appellant maintains that the offence is limited to the case of one who carries on an agency business and does not comprehend a man who is casually entrusted with money either on one individual occasion or, indeed, on a number of occasions, provided that the evidence does not establish that he carries on an agency business. In the present case, it is maintained, no agency business was carried on: the appellant merely received certain sums of money and kept them temporarily, having provided for their ultimate payments by the encashment of his cheques.
>
> The correctness of these contentions depends on the true construction of the language quoted. For the appellant his submission is put in two ways. Firstly, it is said that whatever might have been the result if the words 'in the way of his 'business' were omitted, their presence excludes the possibility of anyone who does not carry on an agency business coming within the section in as much as no one can misappropriate money 'in his business' unless he is engaged in a business of some sort: a man may casually misappropriate money and be guilty under ss 388 and 389, but he cannot be included in the limited classes struck at in s 392 unless he is a member of one of the categories referred to.

Having thus identified the issues in the case and the appellant's submissions upon them, Lord Porter went on to say as follows (at pp 417–420):

The argument that the subsection comprehends only those engaged in a particular occupation does not lack authority in England. It is supported by three cases spread over a period of time from *R v Prince* (1827) 2 C & P 517 to *R v Portugal* (1885) 16 QBD 487 and *R v Kane* [1901] 1 QB 472. The principle is perhaps most clearly enumerated in the second of these cases where it is said (at pp 490–491):

> It was contended by the Crown, that, although the prisoner was not either a banker, merchant, broker, or attorney, and although he was not intrusted with either sum of money in any of those capacities, yet he came within the term, 'other agent intrusted with money or valuable security' within the meaning of s 75. To this it was answered that, if that contention of the Crown be correct, the section should have said, 'whosoever, having been intrusted as agent with any money' etc; that no interpretation or effect would be given to the words 'banker, merchant, broker, or attorney;' and that, it was obvious that some effect must be given to those words, if possible, in construing the section, for otherwise the section might be held to apply to everybody intrusted with money to be applied as by the section is provided. In this we agree. We notice that the Larceny Act, a portion of the 75th section of which we are called upon to construe, after in earlier sections classifying various places and things from and of which larceny may be committed — see ss 31, 38, 40, 50, 60, 62 and 63 — proceeds to specify certain classes of persons who may be guilty of the offences therein described; for instance, from ss 67–73, clerks, servants, or persons in the public service are classified; in s 74, tenants and lodgers are classified; and in s 75 and afterwards the class aimed at is that of agents, bankers, factors. In our judgment s 75 is limited to a class, and does not apply to everyone who may happen to be intrusted as prescribed by the section, but only to the class of persons therein pointed out.

So far the reasoning is directly applicable to the case under consideration, subject to immaterial variations as the provisions of the two Acts require. It is true that the judges who tried the case went on to place some reliance on the fact that the English Act 24 & 25 Vict c 96, s 75, uses the words 'banker, merchant, broker, attorney, or *other* agent' and to draw the inference therefrom that the agent must, like the preceding types, form one of a class. But this is only an additional ground for their decision and is merely used as a support of the view which they already entertained. *Kane*'s case in the Court of Crown Cases Reserved followed *R v Portugal*, though that court was not bound by the earlier decision. Save to this extent it does not add any further support to it.

It was argued on behalf of the Crown that the word 'attorney' has a different meaning in Ceylon from that which it bears in England and that the Act now under consideration does not contain the word 'other'. So far as the second matter is concerned, it is to be noted that the Ceylon Penal Code does include the phrase 'in his business' and in Their Lordships' view this expression is at least as important as the word 'other' in the English Act. So far as the word 'attorney' is concerned, Their Lordships would point out that the wording of the Ceylon Act is obviously taken direct from the Larceny Act 1812, 52 Geo 3, c 63, s 2, which is repeated in 24 & 25 Vict c 96, s 75.

> In the case of an English Act the doctrine is well established that the interpretation put upon an earlier statute by the courts should as a rule be followed in a case where similar words are used in a later statute. So in the case of a colonial statute it has been held by this board that in colonies where an enactment has been passed by the legislature in the same terms as an English statute, the colonial courts should adopt the construction put upon the words by the English courts — see *Trimble v Hill* (1879) 5 App Cas 342. It is true that in that case the decision referred to was one given by the Court of Appeal and that the courts which it was said should follow it were courts of a colony, but in Their Lordships' view English courts should themselves conform to the same rule where there has been a long-established decision as to a particular section of an Act of Parliament, and even more so where there has been a series of decisions over a period of years. They accordingly are of opinion that in the case of the courts of a member of the British Commonwealth of Nations a similar course should be followed.
>
> In enunciating the construction which they have placed on s 392 they would point out that they are in no way impugning the decisions in certain cases that one act of entrustment may constitute a man a factor for another provided he is entrusted in his business as a mercantile agent, nor are they deciding what activity is required to establish that an individual is carrying on the business of an agent. In the present case the appellant clearly was not doing so, and was in no sense entitled to receive the money entrusted to him in any capacity, nor, indeed, had Mr Ranatunga authority to make him agent to hand it over to the bank.

In *RK Dalmia v Delhi Administration* AIR 1962 SC 1821, the appellant, Dalmia, was charged with criminal breach of trust under s 409 of the Indian Penal Code, which is in terms identical to our s 409 before the latter's amendment. The charge alleged that the offence was committed as 'an agent in your capacity as chairman and the principal officer of Bharat Insurance Co Ltd'. It was argued, relying upon *Cooray* that the appellant was not an 'agent' within s 409 as he was not a professional agent carrying on the business of agency. The Supreme Court of India rejected this submission.

Raghubar Dayal J, who delivered the judgment of the court said:

> What s 409 of the IPC requires is that the person alleged to have committed criminal breach of trust with respect to any property be entrusted with that property or with dominion over that property in the way of his business as an agent. The expression 'in the way of his business' means that the property is entrusted to him 'in the ordinary course of his duty or habitual occupation or profession or trade'. He should get the entrustment or dominion in his capacity as agent. In other words, the requirements of this section would be satisfied if the person be an agent of another and that other person entrusts him with property or with any dominion over that property in the course of his duties as an agent. A person may be an agent of another for some purpose and if he is entrusted with property not in connection with that purpose but for another purpose, that entrustment will not be entrustment for the purposes of s 409 of the IPC if any breach of trust is committed by that person. This interpretation in no way goes against what has been held in *R v Portugal* (1885) 16 QBD 487 or in *Cooray's*

> *case* [1953] AC 407, and finds support from the fact that the section also deals with entrustment of property or with any dominion over property to a person in his capacity of a public servant. A different expression 'in the way of his business' is used in place of the expression 'in his capacity,' to make it clear that entrustment of property in the capacity of agent will not, by itself, be sufficient to make the criminal breach of trust by the agent a graver offence than any of the offences mentioned in ss 406–408 of the IPC.
>
> With respect, we are unable to accept the interpretation placed upon the section by Their Lordships of the Indian Supreme Court. To adopt the view expressed in the passage above quoted would, in our judgment, be tantamount to rewriting the section by means of an unauthorized legislative act. We would, therefore, with respect, prefer the reasoning of the board in *Cooray*.

[398] That was the uncertainty which had to be dealt with not just in this country but also in other common law jurisdictions, as the discussion in *Periasamy s/o Sinnappan & Anor v Public Prosecutor* demonstrates. The Court of Appeal of Singapore more relatively recently deliberated on the same question in *Public Prosecutor v Lam Leng Hung & others* [2018] SGCA 7, and in its analysis of the judicial interpretation of this and other analogous provisions in the United Kingdom, Ceylon, India and Malaysia, the view of the Court of Appeal in *Periasamy s/o Sinnappan & Anor v Public Prosecutor* was referred to with approval.

[399] Such interpretative difficulty has, as mentioned, been removed from the statute books in this country since the amendments of 1993 in (Act A860). The words 'in the way of his business' are no more. As such, presently, in that context, s 409 merely requires the prosecution to show that the accused is an agent. And this is how the three CBT charges before me are framed. Incidentally it does not escape my observation that these charges do not also allege the accused in his capacity as a public servant. So that is not a matter to be considered in this trial.

The definition of 'agent' in the Penal Code

[400] The word 'agent' in the context of the offence of criminal breach of trust is thus presently defined in s 402A which reads as follows:

> 402A Definition of 'agent', 'company', 'director' and 'officer'
>
> For the purposes of sections 403, 404, 405, 406, 407, 408, 409, 409A, 409B, 415, 416, 417, 418, 419 and 420 of this Chapter, unless the contrary appears from the context:
>
> 'agent' includes any corporation or other person acting or having been acting or desirous or intending to act for or on behalf of any company or other person whether as agent, partner, co-owner, clerk, servant, employee, banker, broker,

auctioneer, architect, clerk of works, engineer, advocate and solicitor, accountant, auditor, surveyor, buyer, salesman, trustee executor, administrator, liquidator, trustee within the meaning of any Act relating to trusteeship or bankruptcy, receiver, director, manager or other officer of any company, club, partnership or association or in any other capacity either alone or jointly with any other person and whether in his own name or in the name of his principal or not; ...

[401] The three CBT charges as drafted by the prosecution allege that the accused was entrusted with the property of SRC in his capacity as an agent, being the Prime Minister, Finance Minister and advisor emeritus of SRC.

Whether the relationship of principal-agency must be shown

[402] The defence submitted that the prosecution fails to prove that the accused was an agent within the meaning of s 402A in the context of s 409. The essence of the defence's argument is that the relationship of agent-principal must still be shown to exist. The principles of agency must still be read into the definition of 'agent' in s 402A. Reference to the *ejusdem generis* and *noscitur a sociis* principles too are made in support of this argument. It is further argued that for the parties specified as an agent in s 402A, a number of pre-requisites must exist namely that there must be a principal, the agent must be subservient to the principal vis a vis the actions taken, the said actions must be for and on behalf of the principal within the limit of the authority granted by the principal, and there must be a duty cast on the agent by virtue of the authority.

[403] The defence also refers to the decision of the Indian Supreme Court *RK Dalmia v Delhi Administration* LNIND 1962 SC 146; [1963] SCR (1) 253, and in particular to the following passage, as highlighted, from the judgment of the court:

What s 409 IPC requires is that the person alleged to have committed criminal breach of trust with respect to any property be entrusted with that property or with dominion over that property in the way of his business as an agent. The expression in the way of his business' means that the property is entrusted to him in the ordinary course of his duty or habitual occupation or profession or trade'. He should get the entrustment or dominion in his capacity as agent. In other words, the requirements of this section would be satisfied if the person be an agent of another and that other person entrusts him with property or with any dominion over that property in the course of his duties as an agent. A person may be an agent of another for some purpose and if he is entrusted with property not in connection with that purpose but for another purpose, that entrustment will not be entrustment for the purposes of s 409 IPC if any breach of trust is committed by that person. This interpretation in no way goes against what has been held in *Reg v Portugal* (1885) Ib QBD 487 or in *Mahumarakalage Edward Andrew Cooray's Case* (1953) AC 407 419, and finds support from the fact that the section also deals with entrustment of property or with any dominion over property to a person in his capacity of a public

servant. *A different expression 'in the way of his business' is used in place of the expression 'in his capacity,' to make it clear that entrustment of property in the capacity of agent will not, by itself, be sufficient to make the criminal breach of trust by the agent a graver offence than any of the offences mentioned is ss 406 to 408 IPC. The criminal breach of trust by an agent would be a graver offence only when he is entrusted with property not only in his capacity as an agent but also in connection with his duties as an agent.* We need not speculate about the reasons which induced the Legislature to make the breach of trust by an agent more severely punishable than the breach of trust committed by any servant. The agent acts mostly as a representative of the principal and has more powers in dealing with the property of the principal and, consequently, there are greater chances of his misappropriating the property if he be so minded and less chances of his detection ...

[404] The defence therefore submitted that in the context of the three CBT charges against the accused in the instant case before me, the capacities of Prime Minister, Finance Minister and advisor emeritus cannot come within the scope of 'agent' of SRC unless the capacities are subservient to SRC which must be regarded as the principal. As against acting independently, there must be a defined authority whereby the acts done are for and on behalf of SRC as the principal, and that the scope of the actions under such capacities must entail certain power to deal with the assets of SRC, that the power to deal with the property of SRC must be in pursuance to some direction from SRC. And in so acting, there must be some duty owed to SRC as the principal.

[405] The prosecution's position is more direct to the point, relying on the provisions of s 402A, as drafted.

Whether SRC could be held as the principal for the accused

[406] As I have stated, there is no requirement to prove the existence of a principal and agent relationship. In its argument to support its contention that the prosecution has not shown the existence of a principal and agent relationship, the defence has even admitted in its written submissions that the accused's power was superior to that of SRC in the sense that its board of directors required the approval of the accused before it could implement certain acts, and that the accused did undertake certain acts in exercise of his powers under the M&A. In that sense, it was the accused who was actually making decisions on behalf of SRC, exercising his powers vested in the M&A.

[407] I must reiterate that the accused was at all material times the Prime Minister and in that capacity was named in the M&A of SRC and given specific powers, including that of appointing and removing the directors of the company.

[408] For the same reason, there is no necessity for the prosecution to show that to qualify as an agent, the accused must be subservient to his principal, namely SRC. The accused had in fact on evidence acted in his own name, and not in the name of a principal when he himself signed all the shareholder instructions which were followed by the directors of the company.

[409] SRC could not have been a principal of the accused because it was the accused who was the controlling mind of the company and its directors. His link with the company, and its board was its own CEO and director, Nik Faisal. Evidence shows that the latter acted on the instructions of the accused, and did not gain anything from the funds of SRC. In contradistinction, the accused personally benefitted from the RM42m of the funds of SRC which was deposited into the accused's personal bank accounts, the subject of the criminal charges against the accused.

[410] In his capacity as the country's Minister of Finance, the accused was the shareholder of SRC by virtue of his position as Minister of Finance Incorporated under the law, the sole registered and legal owner of SRC upon the company being made a wholly owned MOF Inc entity on 14 February 2012. Again the contention of the defence that any act of the accused in the abovementioned position would not be an act 'for and on behalf' of SRC to qualify himself as an agent is fallacious, for there is no such condition to the applicability of s 402A. On the contrary the accused's action was always 'for his own benefit' by using his position as the Minister of Finance to gain control of SRC and acted as the 'shadow director' of SRC or a director within the meaning in s 402A to direct the company directors to carry out his instructions.

[411] Similarly the cases referred to by the defence to show that shareholders are not agents of a company, while correct, are immaterial to the instant case. The accused had complete and overarching control over all things SRC. He was a shadow director or a director under s 402A which makes him an agent under the same section, thus fulfilling the element of an agent for the purposes of s 409 of the Penal Code as framed in the three CBT charges against the accused.

[412] I cannot therefore but agree with the contention of the prosecution that if the definition of 'agent' as asserted by the defence was accepted, it would mean that any person who with authority acts (such as a shadow director or a director under s 402A) in a superior manner to company directors, cannot ever be held liable for offences under s 409 of the Penal Code.

Whether the definition of 'agent' imposes any such requirements

[413] I think regard must in this context be had to the provision of s 402A of the Penal Code itself. Its extent and scope must be appreciated. It provides a

formulation of a wide-ranging definition of 'agent'. A careful reading of this lengthy definition of 'agent' does not in my view justify the interpretation ascribed by the defence which places a number of limits on who could qualify as an agent under this s 402A.

[414] Whilst the theoretical basis may still underpin the concept of agency which presupposes the existence of an agent and principal relationship, there is nothing in that statutory provision which imposes the other characteristics suggested by the defence. In fact, even the need to establish the existence of a principal and other aspects relating thereto is significantly diminished by these very words appearing at the end of the definition in s 402A — 'whether or not for a principal or not'.

[415] Neither has the defence referred this court to any case law authorities to support its construction of the term 'agent' — at least not in respect of its definition in s 402A or its equivalent, in the context of the offence under s 409 which is the basis of three of the criminal charges now faced by the accused.

[416] I should also add that the above-mentioned case referred to by the defence — the Supreme Court *RK Dalmia v Delhi Administration* is based on the Indian Penal Code which does not have an equivalent provision to s 402A of the Malaysian Penal Code. And in any event as I have shown earlier, the Court of Appeal in *Periasamy s/o Sinnappan & Anor v Public Prosecutor* did in its application of the former s 409 of the Penal Code discuss *RK Dalmia v Delhi Administration* but preferred the approach taken in the decision of the Judicial Committee of the Privy Council in *Cooray v R* [1953] AC 407.

[417] On an ordinary and literal interpretation of s 402A, it is plain that any of the capacities specified therein is, without more, an agent. There is no necessity to fulfil other requirements which are not there in the first place. After all courts cannot legislate. Indeed, in *Periasamy s/o Sinnappan & Anor v Public Prosecutor*, Gopal Sri Ram JCA (as he then was) mentioned that *Cooray v R* is to be preferred over *RK Dalmia v Delhi Administration* because otherwise it would tantamount to the court rewriting the very s 409 by means of an unauthorised legislative act.

[418] This court must therefore apply the definition of 'agent' in its clear, ordinary and unambiguous language as widely expressed in s 402A of the Penal Code without any necessity to read into this statutory provision other principles such as the law on agent-principal relationship. It would be wholly unwarranted. For much the same reason, the defence's reliance on the maxim of 'ejusdem generis' and 'noscitur a sociis' too is misconceived.

[419] In the Federal Court decision in *Metramac Corp Sdn Bhd (formerly*

known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd [2006] 4 MLJ 113; [2006] 3 CLJ 177 Augustine Paul FCJ in clear terms articulated thus:

> The primary duty of the court is to give effect to the intention of the Legislature as expressed in the words used by it and no outside consideration can be called in aid to find another intention (see *Nathu Prasad v Singhai Kepurchand* [1976] Jab LJ 340). Thus the duty of the court, and its only duty, is to expound the language of a statute in accordance with the settled rules of construction and has nothing to do with the policy of any statute which it may be called upon to interpret (see *Vacker & Sons Ltd v London Society of Compositors* [1913] AC 117; *NKM Holdings Sdn Bhd v Pan Malaysia Wood Bhd* [1987] 1 MLJ 39; [1986] 1 LNS 79).

[420] It is in any event trite that this is a long standing position already entrenched in the law. The Judicial Committee of the Privy Council in a 19th century case of *Dyke v Elliott, The Gauntlet* (1872) LR 4 PC 184 had ruled that strict construction must be made of statutes which are penal in nature. These observations are most instructive:

> No doubt all penal Statutes are to be construed strictly, that is to say, the Court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip, that there has been a cause *omissus*, that the thing is so clearly within the mischief that it must have been intended to be included and would have been included if thought of. On the other hand, the person charged has a right to say that the thing charged, although within the words, is not within the spirit of the enactment. But where the thing is brought within the words and within the spirit, there a penal enactment is to be construed, like any other instrument, according to the fair common sense meaning of the language used, and the Court is not to find or make any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument.

[421] Furthermore, I cannot disagree with the submission of the prosecution which highlights what had been expressed by the relevant Cabinet minister when tabling in Parliament the said 1993 amendments which refined s 405 and included a new s 402A of the Penal Code. An excerpt of the speech of Dato' Syed Hamid bin Syed Jaafar Albar in the *Hansard* on Wednesday, 4 August 1993(at p 6293) reads as follows:

> Pindaan juga dibuat bagi memasukkan definisi baru seperti yang disebut dalam Fasal 5. Pindaan-pindaan tafsiran di atas dicadangkan dibuat untuk mengatasi masalah pentafsiran teknikal yang menjadi asas pelepasan mereka yang telah dituduh di mahkamah. Ianya juga bertujuan melengkapkan peruntukan yang sedia ada agar kelonggaran peruntukan perundangan tidak dipergunakan sebagai asas pelepasan mereka yang terlibat. Seperti yang telah disebut, peningkatan kesalahan-kesalahan jenayah kolar putih amat membimbangkan dan mungkin akan mengganggu-gugat kepentingan awam dan sekaligus pertumbuhan ekonomi negara.

[422] It is plain from the *Hansard* that the rationale for the amendment to s 405 and the attendant introduction of s 402A is to overcome the technical interpretative difficulties then causing problems to the determining the true application of the law on the crime of CBT under s 405, as I have discussed in reference to the Court of Appeal decision in *Periasamy s/o Sinnappan & Anor v Public Prosecutor*. The speech as recorded in Hansard states clearly that the changes were intended to rid the existing provisions of loopholes and uncertainties that could result in acquittals of persons charged with white collar crimes, which was on the rise, against the interest of the public.

Whether a director is also an agent, and is defined under s 402A of the Penal Code

[423] A director is also an agent under s 402A pure and simple. Much of the local jurisprudence on criminal breach of trust cases concern accused persons who were charged on the basis of their agency capacity of directors.

[424] Importantly, the concept of a director is also specifically defined in the provisions such as for the offence of criminal breach of trust under s 409 of the Penal Code. Section 402A defines 'director' as follows:

> 402A Definition of 'agent', 'company', 'director' and 'officer'
>
> For the purposes of sections 403, 404, 405, 406, 407, 408, 409, 409A, 409B, 415, 416, 417, 418, 419 and 420 of this Chapter, unless the contrary appears from the context:
>
> 'director' includes any person occupying the position of director of a company, by whatever name called, *and includes a person who acts or issues directions or instructions in a manner in which directors of a company are accustomed to issue or act*, and includes an alternate or substitute director, notwithstanding any defect in the appointment or qualification of such person; ... (Emphasis added.)

[425] That the interpretation of any concept or terminology such as 'agent' or 'director', as contained in any offence as created by a penal statute like the Penal Code should, as I have stated earlier, be construed as defined in that same legislation is further demonstrably fortified by the decision of the Supreme Court in *Yap Sing Hock & Anor v Public Prosecutor* [1992] 2 MLJ 714.

[426] That case concerns, for present purposes, the charge for CBT under s 409 of the Penal Code against one who was accused to have been a director of a company, not unlike the instant case before me. This case was however decided, as is manifest from its citations, prior to the 1993 amendments. Which means s 402A had not yet been introduced.

[427] The prosecution in that case submitted that the definition of 'director'

in s 4 of the Companies Act 1965 could be made applicable to hold the accused liable for an offence under s 409 of the Penal Code. A

[428] The Supreme Court disagreed. It held that the definition of 'director' in s 4 of the Companies Act 1965 cannot be applied to the charges under the Penal Code or under any other law. That definition in s 4 is confined only to offences under the Companies Act 1965. Peh Swee Chin SCJ, writing for the Supreme Court in *Yap Sing Hock & Anor v Public Prosecutor* [1992] 2 MLJ 714 made the following important observations: B

> The definition of 'director' in s 4 of the Act, in our view, cannot be applied to the charges preferred under the Penal Code (FMS Cap 45), and any other law for that matter (except under the Companies Act 1965 itself), which has to be strictly construed in favour of liberty. Whether both appellants were directors or not became a question of fact which the prosecution had to prove beyond a reasonable doubt. The same view was espoused by the Court of King's Bench comprising three judges in *Dean v Hiesler* in which the accused was charged as being a director of a company in connection with certain offences under reg 91 of the Defence (General) Regulations. It was held that reg 91 in question, being a penal enactment, must be construed strictly in favour of the defence and the accused who had not been duly appointed as director of the company in question, could be such a director. Similar argument was advanced there about the definition of director in the Companies Act 1929 of Britain being extended to a person in the position of a director though not an actual director was rejected. We are in entire agreement with the reasoning behind the rejection of such similar argument. Only for compliance with all the requirements of the Act and the prosecution of offences created by the Act, the definition of 'director' in the Act applies. C D E F

[429] As such, given that this means that the definition in one Act of Parliament should not be imported to interpret an offence in another statute, it necessarily follows that the definition of 'agent' as well as 'director' presently enacted in s 402A of the Penal Code must therefore be construed strictly within the meaning of the words used in that s 402A, without any unauthorised reference to any other written law. G

[430] I should also state that the definition of 'director' in s 402A is not so different from that found in s 4 of the Companies Act 1965 which was in force during the material period relevant to the charges against the accused. H

[431] The latter reads as follows:

> 4 Interpretation I
>
> 'director' includes any person occupying the position of director of a corporation by whatever name called and *includes a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act* and an alternate or substitute director. (Emphasis added.)

A **[432]** Although the prosecution in its written submissions contends that the s 402A definition is in pari materia with the definition of 'director' in s 4 of the Companies Act 1965, it is pretty clear that the two formulations are *not* exactly identical.

B **[433]** Under the Penal Code, a director includes one who acts or gives instructions in a manner a director is accustomed to act and give, whilst the Companies Act formulation includes one in accordance with whose instructions the directors are accustomed to act.

C **[434]** In other words, the former refers to as a director, one who acts like a director whilst the latter makes one a director whose instructions are usually followed by the directors.

D **[435]** Notwithstanding the subtle difference, the essence of this category of directors as enacted in both statutes — known in law as shadow directors is unmistakable, even though the definition of 'director' found in the Companies Act 1965 is in my view generally understood to be more closely represent the shadow director concept.

E **[436]** Having regard to the totality of the evidence I think it is abundantly clear that the accused could in essence and substance be construed as a shadow director of SRC or as its director as defined in s 402A of the Penal Code. And as such a director, the accused must at all times like any duly appointed
F director, act in the best interests of the company, and be subject to the same duties and obligations of a director under the law (see *Halsbury's Laws of England*, 4th Ed Reissue, Vol 7(I) p 429).

Whether the accused is a shadow director

G **[437]** There was no formal appointment of the accused as a director of SRC but it was clear from evidence that the directors of SRC were accustomed to act in accordance with his instructions and directions.

H **[438]** An English authority often referred to explain the concept of shadow directors in the decision of Millett J in *Re Hydrodam (Corby) Ltd* [1994] 2 BCLC 180 where it was held thus:

> Liability for wrongful trading is imposed by s 214 of the Insolvency Act 1986. The
I statutory liability is imposed exclusively upon persons who are or were at the material time directors of the company in liquidation. But s 214(7) provides that in the section 'director' includes a shadow director. A shadow director is defined in s 251 of the Insolvency Act 1986 in these terms:
>
> 'Shadow director' in relation to a company, means a person in accordance with

whose directions or instructions the directors of the company are accustomed to act ... A

[439] I pause here to draw emphasis, again, on the fact that this definition is identical to the Companies Act 1965 definition, and as I have just highlighted, quite different from the formulation in s 402A of the Penal Code. B

[440] Millett J in *Re Hydrodam (Corby) Ltd* then went on to explain the different types of directors, and stated the characteristics of a shadow director, in the following terms: C

> I need not recite the proviso to that definition. Directors may be of three kinds; de jure directors, that is to say, those who have been validly appointed to the office; de facto directors, that is to say, directors who assume to act as directors without having been appointed validly or at all; and shadow directors who are persons falling within the definition which I have read ... D
>
> ... A de facto director, I repeat, is one who claims to act and purports to act as a director, although not validly appointed as such. A shadow director, by contrast, does not claim or purport to act as a director. On the contrary, he claims not to be a director. He lurks in the shadows, sheltering behind others who, he claims, are the only directors of the company to the exclusion of himself. He is not held out as a director by the company. E
>
> To establish that a defendant is a shadow director of a company it is necessary to allege and prove: (1) who are the directors of the company, whether *de facto* or *de jure*; (2), that the defendant directed those directors how to act in relation to the company or that he was one of the persons who did so; (3) that those directors acted in accordance with such directions; and (4) that they were accustomed so to act. What is needed is first, a board of directors claiming and purporting to act as such; and secondly, a pattern of behaviour in which the board did not exercise any discretion or judgment of its own, but acted in accordance with the directions of others. F G

[441] If the test propounded by Millet J in *Re Hydrodam (Corby) Ltd* as set out above is to be followed, evidence would demonstrate that the four stated characteristics are met in the case now before me. H

[442] First, on the identification of the directors of SRC and as to whether they are *de facto* or *de jure*, the letter from the accused as the Prime Minister dated 1 August 2011 specifically named the directors of SRC who were all formally and validly appointed as a result, making them *de jure* directors. I

[443] As stated earlier, the directors of SRC — in this context *de jure* ones — can only, because of article 67 of the articles of association of SRC be appointed and removed by the Prime Minister — the accused himself — and by no other.

[444] Secondly, as to whether the accused directed these directors how to act in relation to SRC, it bears emphasis that the accused had issued various shareholder's instructions to and for implementation by the board of directors of SRC — in his capacity as the Finance Minister who under law constitutes MOF Inc. the sole shareholder of SRC. More on this shortly.

[445] Thirdly, as to whether the board of directors acted in accordance with those directions, the answer is in the affirmative. Resolutions of the MOF Inc were followed by the directors of SRC, even though the subject matters of these resolutions concerned more management type issues. There is no evidence that the directors questioning much less disobeying any such instructions.

[446] Fourthly, in relation to the requirement whether the directors were accustomed so to act with the instructions of the accused, again I would find the answer in the positive. Evidence which go towards supporting this finding, if I might add, quite overwhelmingly, quite apart from the fundamental consideration that the accused as the Prime Minister was the one which the power to appoint and remove the board of directors of SRC, are as follows.

The evidence of the accused acting in a manner the SRC directors are accustomed to act (s 402A director) and the evidence of the SRC directors being accustomed to act in accordance with directions of the accused (shadow director)

Whether the testimony of PW39 and PW42, as SRC directors shows influence and control of the accused over the directors of SRC

[447] It would not be incorrect to state that no better evidence to explain the extent of the control and influence the accused had over SRC could be proffered other than that testified by those who were actually responsible under the law for the management of the company. The board of directors of SRC was led in the initial few years of its existence — from 2010–2014 by Tan Sri Ismee Ismail (PW39). Dato' Suboh Yassin (PW42) was another member on the board of the company and was still a director during the period subject to the seven charges.

[448] Their evidence in respect of the influence and control of the accused over the directors of the SRC is crucial. There were a number of other directors appointed by the accused. They were not called by the prosecution to give evidence. I reiterate that all directors of SRC were appointed by the accused as the Prime Minister.

Nik Faisal, the CEO as the board of directors' link with the accused

[449] PW39 was the first Chairman of SRC. He testified that for meetings of the board of SRC which were generally held on quarterly basis, these meetings discussed matters which concerned the operations of SRC where the directors were briefed and updated by its CEO, Nik Faisal. PW39 testified that decisions of the board required the advice of the accused by virtue of his position as the Prime Minister and as the person who had the power to appoint and dismiss the directors, and as the advisor emeritus of the company.

[450] And for this important purpose, Nik Faisal acted as the bridge between the board and the accused. When queries were raised by PW39, Nik Faisal would generally respond with the same answer, 'perkara itu telah dibincangkan dan dipersetujui oleh Kerajaan'. Or that it had been discussed and agreed to by the government. PW39 stated that he understood 'Kerajaan' as mentioned by Nik Faisal in his mind to be the accused.

Shareholder minutes of 1MDB issued by the accused as MOF Inc for the first RM2 billion loan

[451] It is a key contention of the prosecution that to demonstrate the involvement of the accused in SRC matters, as testified by PW39, the minutes of the board of directors' meeting No 1/2011 held on 23 August 2011 (exh P495), recorded that the board agreed to the first RM2 billion loan from KWAP in light of an earlier instruction in exh P530 from 1MDB which was then the sole shareholder of SRC, which in turn was wholly owned by MOF Inc.

[452] The point is therefore this. There was already, before the board of directors of SRC deliberated on the matter, a shareholder minute (the resolution of the shareholder prepared in the form of the minutes of the general meeting of the company, initially 1MDB, later SRC after the change in ownership) executed by the accused representing MOF Inc, agreeing to the loan by SRC, which in the view of its then chairman, ought to be followed. And indeed it was.

The shareholder minute on the deposit of RM1.8 billion overseas (P497)

[453] Another important piece of evidence which fortifies the contention that the directors of SRC operated on the basis of adhering to the shareholder's resolutions issued by the accused concerned deposits of funds of SRC outside jurisdiction.

[454] This was where P497, signed by the accused as MOF Inc instructed SRC to deposit funds amounting to RM1.8 billion in two bank accounts

overseas, namely in Falcon Bank and Julius Baer, both situated in Hong Kong which PW39 testified to be an instruction to the board of directors of SRC.

The shareholder minute on the use of the second RM2 billion (P501)

[455] Yet another example can be noted from the contemporaneous records of the board of SRC meeting minutes 1/2012 held on 14 February 2012 (exh P496) where it was documented that the second RM2 billion loan from KWAP was to be utilised based on the shareholder instruction executed by the accused dated 17 February 2012 (exh P501), with included the resolution that some USD500m to be raised from the additional RM2 billion raised from the financing from KWAP be placed in the account of a wholly owned subsidiary of SRC at BSI Bank in Lugano Switzerland.

[456] And crucially this instruction was followed by a SRC directors' circular resolution ('DCR') of even date (exh P385) in order to execute the same. The contents of the DCR (P385) in respect of the items for approval are virtually identical to that of the shareholder minute (P501).

The first set of shareholder minutes when SRC was wholly owned by 1MDB (P530)

[457] It would be incomplete if not wholly remiss of me not to at least allude to a set of SRC shareholder resolutions in exh P530 signed by the accused as MOF Inc which at that time wholly owned 1MDB which in turn was the parent of SRC. These resolutions were handed over by the special officer to the accused for the attention of the chairman of the board of directors of 1MDB. It is of significance that the testimony of PW39 revealed that this was the first shareholder instruction that PW39 had received on SRC.

[458] In effect, this set of resolutions became, as correctly submitted by the prosecution the basis of almost all the resolutions that the board of SRC had ever executed, given the subject matters covered by the resolutions which are all-encompassing, covering the operational, governance and business aspects of SRC, including the following:

(a) the acceptance of the first RM2 billion loan from KWAP;

(b) the appointment of PW39 as the chairman of the board of directors of SRC, as well as the appointment of all other members of the board;

(c) the appointment of Nik Faisal as the CEO of SRC;

(d) the opening of SRC's bank account at AmBank;

(e) the establishment of a wholly owned subsidiary of SRC to be registered in the British Virgin Islands;

(f) the opening of accounts with Julius Baer in Hong Kong/Dubai with a deposit of USD$100m and with Falcon Private Bank in Dubai with a deposit of USD$500m;

(g) the appointment of SRC's auditors, company secretary and legal counsel; and

(h) the establishment of a joint-venture between a subsidiary of SRC to be established, and AABAR and the contribution of USD$500m in cash to the JV.

[459] PW39 testified that directors were mindful of the instructions from the accused in P530 and were not in a position to ignore them, and that they considered and executed most of the decisions in P530. PW39 was clear in stating that he had no reason not to follow P530 and the board of directors of SRC acted upon them then as instructions that had been conveyed to them from the shareholder of its own parent company that was 1MDB.

The accused's approval as Prime Minister (P512) for a new article on creation of advisor emeritus position and resolution via shareholder minute (P510)

[460] Another, probably most cogent proof yet of the directors of SRC following the directions of the accused is in respect of the creation of the position of advisor emeritus in SRC. A position which required the amendment to the M&A of the company which meant that the approval of the Prime Minister was necessary.

[461] The new article 117 itself appointed the sitting Prime Minister of the country as the advisor emeritus of the company. The Prime Minister then was also the accused.

[462] Thus, by a letter from the Prime Minister in exh P512, the accused approved the amendment to the M&A by the introduction of the new article 117. The shareholder, MOF Inc, as represented by the accused, also issued the requisite shareholder minute in P510 resolving to approve article 117. This then resulted in the directors of SRC resolving by way of a directors' circular resolution (P511) to follow suit in approving the same. All the above documents were dated 23 April 2012.

The directors of SRC also followed the instructions by the accused other than based on shareholder minutes

The accused through Nik Faisal asked loan be disbursed in single drawn-down in a board of directors' meeting of SRC

[463] The board of SRC at its meeting of 2/2011 on 13 September 2011 as recorded in the minutes (P498) had wanted the first RM2 billion loan from KWAP to be drawn down progressively in stages to alleviate the burden of interest payment for unutilised funds. But Nik Faisal, the CEO informed the board that the timing of the drawdown was instructed by the government and SRC had to carry out the instructions. From the said minutes it is also clear that the facility had been fully drawn down.

[464] The single disbursement of the entire loan sum was thus effected, only for RM1.8 billion to be remitted outside the country.

[465] This is further clarified by PW39 who testified that during the said SRC's board of directors meeting, the timing of the drawdown for the RM2 billion loan from KWAP was instructed by the government to be a full drawdown. This was as represented by Nik Faisal. When examined by the prosecution, PW39 said he understood the term 'Government' to be the accused acting as the MOF Inc and the Prime Minister.

[466] The evidence of PW39 shows that the accused acted as the controlling mind of SRC when further instructions were given to the board of directors to execute.

The accused's other decisions executed by the board in its meeting following update by Nik Faisal

[467] There were also other matters which Nik Faisal updated the board of SRC at that meeting (P498) of matters that had been agreed by the accused in his discussion with Nik Faisal. This discussion of 7 September 2011 between the two was also recorded in its own minutes which were also on the face of it signed by both the accused and Nik Faisal confirming its accuracy.

[468] This document is however marked as ID499 as the defence denied there was such a meeting, and Nik Faisal has absconded. IDD499 was in the possession of PW39 as the chairman of SRC.

[469] But the minutes of the SRC board of directors' meeting of 13 September 2011 (P498) did refer to ID499 or the minutes of the discussion between accused and Nik Faisal on 7 September 2011 and recorded the decisions of the board in adherence to the matters raised in that discussion as recorded in IDD499.

The accused made management related decisions for SRC without reference to the directors of SRC

[470] There were also instances where the accused made certain decisions or took steps concerning SRC which had been done on behalf of SRC but which never involved the directors of the company or only made known to them subsequently.

[471] Many of these relate to the involvement of the accused in the financing application process at KWAP and the request for government guarantees from the MOF. These have been discussed earlier in the context of the charge under s 23 of the MACC Act.

[472] Thus these include his role in getting SRC apply to KWAP for financing, and particularly his subsequent communication to PW45 (the Secretary General of the Treasury and the Chairman of KWAP) that instead of the request for RM3.95 billion, and despite KWAP considering a possible financing of RM1 billion to SRC, the amount of RM2 billion would suffice and that the process ought to be expedited.

[473] This had nothing to do with any requests let alone decisions of the directors of SRC.

[474] His influence in getting the treasury officials expedite the guarantee approval through the Cabinet, including his request to PW45 that KWAP effect drawdown to SRC even before the guarantee agreement was finalised in respect of the second RM2 billion too was not known to the directors. These would ordinarily be matters within the remit of the management and the board of directors, but here only Nik Faisal and the accused seemed to be managing these issues.

[475] Yet another example would be when KWAP investment panel decided that the second RM2 billion be disbursed on progressive basis but in an email from Nik Faisal (P388) he stated that there was a meeting among the accused, PW45, PW38 and a Deputy Secretary General of the Treasury where it was agreed that the drawdown of the additional RM2 billion to SRC should be on single bullet payment basis, to follow the drawdown for the first RM2 billion financing.

[476] This, as stated earlier was also confirmed in the testimony of PW29, who was then the assistant vice president in the fixed income department of KWAP. Again therefore, the directors of SRC (other than Nik Faisal who was the CEO) were not in the picture at all.

The accused is thus a shadow director and a s 402A director of SRC

[477] The nexus between the shareholder resolutions and other directions of the accused and the directors of SRC is unmistakable, as was the directors being accustomed to act in accordance therewith where the accused himself instructed on how the funds of SRC were to be utilised.

[478] I cannot therefore not refer to the Court of Appeal decision mentioned by the prosecution, in the case of *Datuk Sahar bin Arpan v Public Prosecutor* [2007] 1 MLJ 697; [2007] 1 CLJ 326 where Low Hop Bing JCA stated the position on shadow directors as follows:

> [47] There can be no doubt that on the facts the accused was at all material time the directing mind and will of Ivory Heights, and controlled what it did, thereby making him the alter ego of Ivory Heights: (see *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 157, 172 per Lord Denning MR, cited with approval in *E v Comptroller General of Inland Revenue* [1970] 2 MLJ 117 at p 128; [1970] 1 LNS 25 (FC)).
>
> [48] The accused was at all material time an embodiment of Ivory Heights and his mind is that of Ivory Heights. (See *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, 170 per Lord Reid, followed in *Yue Sang Cheong Sdn Bhd v PP* [1973] 2 MLJ 177 (FC)).
>
> [49] The accused was indeed the puppeteer who pulled the strings of his puppets viz SP52 and the said Luwe Sang Kau who were directors-cum-shareholders of Ivory Heights and who danced to the tune of the accused.
>
> [50] Further, in fact and in law, the accused was at all material time a shadow director of Ivory Heights. As a shadow director, he comes within the ambit and purview of the word 'director' which is defined in s 4(1) of the Companies Act 1965 as including 'a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act'.(See *Company Law by Walter Woon*, 2nd Edn, pp 222–223).
>
> [51] In *Re Hydrodam (Corby) Ltd* [1994] 2 BCLC 180, 182, Millett J gave a picturesque description of a shadow director in the following words:
>
> > ... A shadow director, by contrast, does not claim or purport to act as a director. On the contrary, he claims not to be a director. He lurks in the shadows, sheltering behind others who, he claims, are the only directors of the company to the exclusion of himself. He is not held out as a director by the company.
>
> [52] The totality of the accused's aforesaid conduct clearly fits the above description of a shadow director. Although the accused was apparently an outsider, he was in de facto control of Ivory Heights in which the de jure directors viz SP52 and the said Luwe Sang Kau were accustomed to act on the accused's directions or instructions: *Re Unisoft Group Ltd (No 2)* [1994] BCC 766 per Harman J at pp 774–775; and *Corporate Powers, Controls Remedies And Decision-making* by Loh Siew Cheang, 1996 p 208.

[479] *Datuk Sahar bin Arpan v Public Prosecutor* [2007] 1 MLJ 697; [2007] 1 CLJ 326 is significant as it recognises the applicability of shadow director liability in criminal law. The concept of shadow director was also more recently considered by the Court of Appeal in *Sazean Engineering & Construction Sdn Bhd v Bumi Bersatu Resources Sdn Bhd* [2019] 1 MLJ 495 where His Lordship Abang Iskandar Abang Hashim JCA (now CJ (Sabah and Sarawak)) instructively observed thus:

> [18] ... And lastly, there is another sub-species that learned author Walter Woon, among others, would describe as a 'shadow' director. He had described this person as 'a rather sinister individual' who is 'in actuality a puppeteer. He pulls the strings and his puppets on the board dance'. And if we may add, the puppets would not just dance, but they would dance to the music or tune of the puppeteer. But, this informal or de facto and shadow director are treated as a director under the CA 1965 for the purpose of attaching liability on them as by their conduct, the law attaches on them a fiduciary duty which they owe to the company which they seek to control or 'orchestrate'. (See, Walter Woon, *Company Law* 2nd Ed, Sweet and Maxwell Asia). For a useful differentiation between a de facto director and a shadow director, see the judgment of Millett J in the case of *Re Hydrodam (Corby) Ltd* [1994] 2 BCLC 180 (High Court of England).

[480] The crucial ability of the accused as the shareholder to have convinced, via his position as MOF Inc and given his status as the Prime Minister and the Finance Minister, the directors of SRC to adhere to important company decisions such as on the deposits of the bulk of the company funds overseas cannot be emphasised enough.

[481] The evidence on the conduct of the accused vis a vis the directors of SRC thus clearly renders the finding that he was at the material time a director (s 402A) and a shadow director of SRC, irresistible.

[482] The fact that the accused dealt with matters which are legally within the purview of directors instead of the shareholders in one thing, but here the situation was decidedly more serious, as the decisions of the shareholder were furnished by no less than the Prime Minister and Finance Minister of the country to the chairman of an entity wholly owned by MOF Inc that was SRC.

[483] It cannot be gainsaid that the conduct of the accused, in the exercise of the formal powers of MOF Inc as the shareholder in issuing the many shareholder instructions does no violence to the description of the puppeteer in absolute control of the puppets that the accused himself had placed when he appointed all the members of the board of SRC pursuant to his authority as the Prime Minister under the articles of the company.

A Other aspects on the involvement of the accused in SRC vis a vis its directors

Accused violates separation of decision-making powers between management and shareholder

B **[484]** Another aspect deserving of mention is this. Most if not all of the matters specified in the resolutions issued by the accused in the capacity of MOF Inc concerned matters which are pre-eminently within the purview of company management, which is in this case should be firmly vested in the board of directors of SRC.

C

[485] And this point is especially manifest in situations not involving any shareholder minutes but where the accused seemed to have made certain decisions for SRC without any reference to the directors of the company.

D

[486] One example, as analysed earlier, is where the accused informed PW45 that a financing amount of RM2 billion to SRC would suffice (instead of a possible RM1 billion mentioned by PW45 to the accused earlier).

E **[487]** In this regard, the important rule in company law on the non-overlapping division of powers between directors and shareholders in the administration of companies must be emphasised.

F **[488]** Whilst relevant provisions may be contained in the M&A of SRC, I would readily make reference to the more pertinent s 131B of the Companies Act 1965 (which is applicable to this case) which codified this common law rule pursuant to the Companies (Amendments) Act 2007 which had been introduced to enhance the framework on the duties and powers of directors under the law.

G

[489] It is worthy of emphasis that s 131B states as follows:

> (1) The business and affairs of a company must be managed by, or under the direction of, the board of directors.
>
> (2) The board of directors has all the powers necessary for managing and for directing and supervising the management of the business and affairs of the company subject to any modification, exception or limitation contained in this Act or in the memorandum or articles of association of the company.

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I

[490] This provision reinforces the principle that the law and the articles divide the powers of the company between the directors and the shareholders, and the latter cannot under the law direct the former on how to exercise the powers properly within the remit of the directors as stipulated in the articles.

[491] I need only refer to the passage from the judgment of Lord Wilberforce in delivering the opinion of the Privy Council in the case of *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 which made the point so clearly as follows:

> The constitution of a limited company normally provides for directors, with powers of management, and shareholders, with defined voting powers having power to appoint the directors, and to take, in general meeting, by majority vote, decisions on matters not reserved for management ... it is established that directors, within their management powers, may take decisions against the wishes of the majority of shareholders, and indeed that the majority of shareholders cannot control them in the exercise of these powers while they remain in office.

[492] In *Grundt v Great Boulder Proprietary Gold Mines Limited* [1948] Ch 145, Cohen LJ observed in similar terms as follows:

> ... there is nothing unusual in the shareholders not being allowed to interfere in matters which have been deliberately placed under the control of the directors.

[493] In the case of SRC, the situation was quite the opposite. It was the accused instead who was instructing the board of directors via, among others, the mechanism, ostensibly, of resolutions of the shareholder. Both PW39 and PW42 were consistent in their testimonies that the board had to follow the instructions from the accused and execute them.

[494] The M&A of SRC are however unlike the typical ones registered for most companies since as stated earlier there were provisions of the special powers of the Prime Minister on the appointments and removals of directors (curiously even drafted in at the time of incorporation, before 1MDB and MOF Inc became its shareholder) as well as those related to the authority of the advisor emeritus.

[495] But the key is most of the instructions came from the accused purportedly in the exercise of his powers as the shareholder that was MOF Inc. And it is nowhere stated in the M&A of the company that the shareholder had any special powers that could override the authority of the management of the company.

[496] Thus the statutory and common law rule in company law on the division of powers between the directors and the shareholder should have applied no differently in SRC. I should make clear that it is true that some of the major decisions were formally properly undertaken by the board of directors. In that sense, there is no overlap on the exercise of powers between the two decision-making organs in the company.

A **[497]** The point to note however is, those decisions were taken because of the directors' stance which construed the resolutions from the shareholder as a form of instructions or otherwise as matters that they should follow. And that renders the accused to fall squarely within the concept of a shadow director or the director within the meaning ascribed to it in s 402A of the Penal Code.

B

[498] I take judicial notice that ordinarily it would be for the company directors who through the issuance of directors' resolutions to decide on all such matters like the ones stated in the various shareholder minutes issued by the accused in this case. Shareholders' resolutions are usually on matters which
C are addressed at the general meetings of the company as governed under the Companies Act 1965 (now Companies Act 2016), such as on the laying of the audited financial statements, the payment of dividends, the election of directors, their remuneration, significant acquisitions and the appointment of
D auditors.

[499] Shareholders' resolutions are usually on matters which are addressed at the general meetings of the company as governed under the Companies Act 1965 (now Companies Act 2016), such as on the laying of the audited financial
E statements, the payment of dividends, the election of directors, their remuneration, significant acquisitions and the appointment of auditors. Shareholders also have the authority on certain matters which the constitution of the company additionally specifies must be approved by them.

F **[500]** These are the reserved matters. They are reserved for the shareholders to decide on, where the ordinary directors' powers under the M&A would not be sufficient for execution.

[501] Matters like accepting financing, opening of bank accounts,
G appointment of CEO, appointment of legal counsel and company secretary and the establishment of a subsidiary as well as a formation of a joint venture company, which are in fact contained in shareholder minute in P530 issued by the accused, do not usually concern the shareholders. Similarly, the deposit of the funds of the company outside jurisdictions such as in shareholder minutes
H in P497 and P501 would also be a management issue subject to the authority of the directors. Unless, these are stated as reserved matters for the shareholder in the M&A (P15). That is not the case either.

[502] In addition, in this case I find that evidence supports the testimony of
I PW39 and PW42 that as directors they would resolve on the relevant matters after receiving the shareholder minutes signed by the accused on the same matters. As I said earlier, even though these shareholder minutes concern matters within the directors' authority, in order to implement them, the directors must still under the law, approved them. This was what happened.

[503] In certain situations, where the board of directors met, the meeting made reference to shareholder minutes from the accused, which the meeting then adopted. In respect of the additional RM2 billion financing obtained from KWAP, for example, the minutes of the meeting of the board of directors of SRC 1/2012 held on 14 February 2012 (P496) record at para 11 that the funds to be procured are to be dealt with based on a shareholder's instruction signed by the accused (P501), which was followed by a directors' circular resolution (P385) in order for those instructions to take effect. That is clear evidence of the directors following the decisions of the accused.

[504] But in some others, the directors' circular resolutions and the shareholder minutes are dated the same. On the totality of the evidence, I do not doubt that the shareholder minutes were issued and shown to the directors first, after the directors resolved to follow to the same effect. This was also the testimony of PW39 when examined by the prosecution:

S:	Apa jawapan tadi?
J:	Jawapan saya, DCR banyak berkaitan dengan isu-isu perbankan. Kerana bank perlukan that resolution for them to accept any instruction from the client.
S:	Dalam context ini, mengapa perlu ada minit shareholder?
J:	This minute shareholder usually shown to us director before sign DCR.
S:	Dalam perkara ini, yang man disediakan dahulu?
J:	Seingat saya minute of shareholder.
S:	Shareholder disediakan dahulu?
J:	Ya.
S:	Siapa tandatangani shareholder ini?
J:	Di sini minister of finance incorporated, Dato' Seri Najib.

Basis for directors' reliance on shareholder minutes

[505] It may well be questioned whether it was reasonable or legitimate for the directors to treat the shareholder resolutions as matters that they should as directors obey. Having considered the evidence in this case, I would answer this question, if made, in the positive.

[506] First, the governance structure of the company is unique, where in addition to being wholly owned by MOF Inc which in law is the Finance Minister (the accused at the material time) the articles gave explicit powers to the accused as the Prime Minister to hire and fire the directors themselves, as

well as powers to the accused, also being the Prime Minister as advisor emeritus to provide advice to the directors on strategic and investment matters. Given this overwhelming presence of the powers of the accused, as the Prime Minister and Finance Minister, in SRC, there was little surprise for the directors to have felt that shareholder resolutions signed also by the accused as Finance Minister representing MOF Inc the sole shareholder of SRC should not be disobeyed.

[507] Secondly, the resolutions on the face of it for the most parts too were construed by PW39 and PW42 as not objectionable. In other words, whilst the directors felt that they had to obey the resolutions of the shareholder issued by the accused, they also took the view that their decisions are within their fiduciary and statutory powers to act honestly in the best interest of the company.

[508] Thirdly, the directors had relied on Nik Faisal, the CEO as the link with the accused in his capacities of Prime Minister, Finance Minister and advisor emeritus vis a vis the running of the company. They then had no reasons to doubt the truth of what had been represented to them about the views or decisions of the accused.

[509] Fourthly, there was never any occasion where the accused himself or any person representing him — given his important position as the leader of the nation and the Finance Minister — brought to the attention of the directors of the SRC that any of the resolutions he had signed on the company to be untrue in any manner.

[510] And, lest it be thought that the directions from the accused came only through the shareholder minutes, as I have mentioned there were also other instances where the decisions of the accused, on matters relating to SRC, such as the need for the drawdown of the RM2 billion be effected in one bullet payment, as opposed to what the directors initially decided ought to have been by way of progressive drawdown. And later for the additional RM2 billion, despite the decision of the Investment Panel for the financing to be released progressively, the PMO meeting chaired by the accused reversed this decision, with no evidence of any SRC directors (other then Nik Faisal) having been involved in this matter.

Whether retention of discretion by directors negates existence of shadow director or a s 402A director

[511] The defence made much of the argument that evidence of PW39 and PW42 representing the testimonies of the directors of SRC at the material period showed that the directors retained the discretion and were mindful of their fiduciary duties under the law such that it could not be said that they were

obliged to follow the shareholder resolutions issued by the accused or that they were in any manner subservient to the accused vis a vis their roles as directors of SRC.

[512] Indeed, a significant argument of the defence is that the corporate governance of SRC as reflected in contemporaneous evidence showed that the board of directors was exclusively entrusted with dominion over funds of SRC and they were not mere puppets. The defence has helpfully listed out in its written submissions in reply for the CBT charges, a summary of the decisions of the board of SRC on all material matters in SRC to demonstrate that the board was vested with the ultimate decision making power and was aware of its fiduciary duties. This is a fairly wide spectrum of matters concerning the management of the affairs of the company. I cannot disagree with this.

[513] However, this argument is misconceived. There is in fact no denying that PW39 and PW42 acknowledged their duties as company directors and that they retained their discretionary authority as directors of SRC. In the first place, their testimonies on this issue are not exactly unexpected. For to have testified otherwise could potentially invite accusations of dereliction of directors' duties against them.

[514] I accept that the evidence by PW39 and PW42 include their assertions that as directors of the company, they were aware of their statutory and fiduciary responsibilities and had acted in the best interest of the company. I do not find this to negate the fact that instructions had been made by the accused to the directors of SRC. After all PW39 testified he did not construe following the instructions of the accused to conflict with his director's fiduciary duties. And the substance of the various instructions were in fact followed by the directors of SRC.

[515] Further in any event, it was equally clear from their testimonies that these two witnesses, as directors of SRC at the material time construed the matters encapsulated in the various shareholder resolutions given to the directors of SRC issued by the accused, and the adoption of the same by the board of directors of SRC in the resolutions of the board passed at the meetings or by way of the directors' circular resolutions did not conflict and was consistent with the directors' fundamental duty to ensure that they acted in the best interest of the company.

[516] PW39 for instance was categorical in stating that he would not have agreed to support the passing of the pertinent directors' resolution if the basis for the same, being the shareholders resolutions, were illegal in the first place.

A **[517]** But this does not mean that they did not obey the shareholders resolutions. They in fact did, and at the same because they did not find these instructions to be objectionable.

B **[518]** The truth is as overwhelmingly shown by evidence, the accused had enormous influence and wielded an overarching position of power in SRC. It simply cannot be emphasised enough that the accused was not only the person who as the Finance Minister, or the MOF Inc the sole shareholder of SRC and 1MDB but was also as the Prime Minister vested with the authority under the C articles of SRC to appoint and dismiss directors of the company and to whom certain reserved matters including amendments must be referred. And as the Prime Minister and MOF Inc the accused also caused the introduction of a new article 117 to appoint himself as an advisor emeritus of the company, to whom advice on strategic matters concerning SRC must be referred.

D **[519]** As such it cannot be said that on evidence, the directors did not have to follow the shareholder resolutions issued by the accused.

Whether contention that the accused was exercising his authority in pursuance E of official and representative capacity meritorious

[520] There is this argument that an exercise of a statutory authority, such as in this case where the accused represented MOF Inc in having issued those shareholder resolutions could not be a basis to found the presence of a shadow F director. I disagree.

[521] First, the shadow director or director under s 402A in this case is established not purely by reason of the shareholder resolutions but also having G regard to the entire circumstances of this case which crucially featured the governance structure which uniquely concentrated the powers of the Prime Minister in hiring and firing the directors, emeritus advisor in giving advice on investment and strategy matters to the directors and the Finance Minister as MOF Inc as the sole shareholder with absolute shareholder related authority H issuing resolutions to the director, in a single person who was the accused.

[522] Secondly, on closer scrutiny it is questionable whether the alleged exercise of shareholder authority by the accused as the Finance Minister was beyond reproach. It is clearly evident from the shareholder minutes that, I instead of allowing the directors to conduct the business and operation affairs of SRC, the accused basically remotely took charge of the company and gave specific instructions to divert the funds of the company overseas, specifically to Dubai, Hong Kong and Switzerland. But significantly, as mentioned earlier, the placement of these funds overseas had nothing to do with the purpose for

which SRC had borrowed the RM4 billion from KWAP — which was specifically for strategic natural resources development for the nation.

[523] Thirdly, despite being an MOF Inc company, SRC was not run like one. The division responsible for overseeing MOF Inc owned companies did not have oversight over SRC. Attempts to appoint a representative from the government on the board of directors of SRC could never materialise. This was the evidence on Datuk Fauziah Yaacob (PW53), a deputy Secretary General of the Treasury. This was strongly supported by the testimony of Datuk Seri Hj Ahmad Husni bin Mohamad Hanadzlah (PW56) who was the Second Finance Minister at the material time whose initiative to travel to Switzerland to verify the status of the funds of SRC held in BSI Bank in Lugano was rejected by the accused who refused permission. More tellingly PW56 was told by the accused on no uncertain terms not to interfere with or get involved in SRC and 1MDB.

[524] Not only that. Evidence by officers of MOF such as PW41, PW43, PW44 and PW45 painted a clear picture of MOF Inc being managed in a 'top-down' approach instead of the more usual 'bottom-up' approach. Instead of relevant recommendations being prepared and worked on by the relevant departments in the MOF, to be eventually submitted to the Finance Minister for approval, here the Finance Minister was the one who started and oversaw the process.

[525] After all it needs no reminding that SRC is owned not by the accused personally but MOF Inc on behalf of the Government of Malaysia. Surely, any such resolutions by the shareholder must be for the benefit of the government and not for the benefit of the accused personally. The actions of the accused ultimately resulted in the default by SRC of the RM4 billion loans taken from KWAP, resulting in further financial loss to the government.

[526] The issuance of shareholder minutes directing the board of directors on actions to be taken by SRC establishes that given the evidence in this case, the accused was a director under s 402A of the Penal Code and thus an agent as defined in the same s 402A.

[527] The accused could not be said to be acting in the best interest of MOF Inc. Surely it could not have been since SRC did not pursuant to the shareholder resolutions issued by the accused utilise the RM4 billion loan for the purpose for which it was granted and had nothing to show for in respect of the government guaranteed loan. This was clearly confirmed by the former Secretary General of the Treasury himself, Tan Sri Wan Abdul Aziz (PW45).The defence was not able in its cross-examination of PW45 to point to a single project that was completed by utilising the RM4 billion loan given to SRC. The loans were simply unaccounted for.

[528] What this means is further clarified by the testimony of the lawyer who attended to the financing transactions. The evidence of Mohd Shuhaimi Ismail, the lawyer who drafted the documentation for the financing by KWAP to SRC (PW48) stated that the total amount of the loan to be repaid to KWAP by the Government of Malaysia by virtue of the government guarantee which resulted from SRC's inability to repay the principal of the loans, together with accumulated interest had increased to RM9.2 billion.

[529] In my view the evidence led at the trial as I have referred to established that the accused via principally the shareholders' resolutions, but also by way of other directions, had issued directions and instructions in a manner in which the board of directors of SRC were accustomed to issue. This squarely puts the accused within the definition of a director under s 402A of the Penal Code. The accused is also a shadow director given his influence and control over the board of SRC which evidence has shown were accustomed to act in accordance with the directions of the accused. As a director in both contexts (as per s 402A and as a shadow director), it necessarily therefore follows that the accused had acted in his capacity as an agent within the meaning of s 409 of the Penal Code.

Whether the accused acting in the capacity as MOF Inc in the affairs of SRC is construed as the conduct of the accused

[530] The defence submitted that any act of the accused which is attributed to the MOF Inc. as the shareholder of SRC must only be equated to the capacity exercisable by MOF Inc as a corporation. This would thus mean that the shareholder minutes said to have been signed by the accused should be construed as having been executed by the corporation, not the accused personally. It should be recalled that from August 2011–14 February 2012, SRC was wholly owned by 1MDB which in turn was wholly owned by MOF Inc. And from 15 February 2012, SRC is wholly owned by MOF Inc.

[531] It is not in dispute that MOF Inc is a body corporate enacted by the Minister of Finance (Incorporation) Act 1957. The key provision for present purposes is s 3 which reads as follows:

> 3 Incorporation of Minister of Finance
>
> (1) The Minister for the time being charged with responsibility for finance shall be a body corporate under the name of 'Minister of Finance' (hereinafter called 'the Corporation').
>
> (2) The Corporation may sue and be sued in its said name and shall have perpetual succession and a corporate seal, and the said seal may from time to time be broken, changed, altered and made new as to the Corporation seems fit, and, until a seal is provided under this section, a stamp bearing the inscription 'Minister of Finance' may be used as the corporate seal.

[532] This statutory provision is plain in its language. In simple terms, for certain purposes the Finance Minister will act in the capacity of a corporation that is MOF Inc. This is when it concerns matters where MOF Inc is the entity used by the government to hold its investments in many companies.

[533] The defence argues that the role of the Finance Minister can only be qua shareholder of SRC vide MOF Inc. The acts of the Finance Minister are not acts for and on behalf of SRC.

[534] Reference is made by the defence to the decision of the High Court in *Tan Sri Adam Kadir v Pos Malaysia Bhd & Ors and another suit* [2012] 1 MLJ 526; [2012] 6 CLJ 206. In this case, the plaintiff unsuccessfully claimed unlawful termination of his chairmanship of the defendant company following a notification letter issued to him by the Finance Minister. MOF Inc was a special shareholder of the defendant. Among the findings of the High Court are that the plaintiff had no contractual relationship with the shareholder (MOF Inc) and that if there were such a contract, it would have been with MOF Inc, who was not a party to the suit, and not the government or the Ministry of Finance.

[535] The High Court made these observations:

> [8] The Minister of Finance (Incorporated) is a legal fiction that incorporates the Finance Minister pursuant to Act 375 Minister of Finance (Incorporation) Act 1957. The entitlement of the Act reads 'An Act to incorporate the Minister charged with responsibility for Finance'. The Minister of Finance becomes a body Corporate and is referred to as the Corporation (see s 3 of the Act). This is a common feature in many government controlled Companies, where through the role of Ministry of Finance Incorporated as a Special Shareholder, the important Corporate personalities in these Companies could be controlled by the Ministry of Finance in view of its investments in these Companies. I find it remarkable that this Act which is now the cornerstone of Government controlled Companies (GLCs) would have been thought about by the founding fathers of this nation as early as 1957 having the foresight to provide for positive intervention by the Government in the corporate field.
>
> [9] In my view it does not matter whether relevant letters were signed by the Minister of Finance or that the Corporation is under the direction and control of the Minister of Finance but as long as the Act is in force, the Minister acts as a corporation and any contractual Privity (if at all) must be with the corporation not the Minister or the Government of Malaysia (see ss 3 and 4 of the Act).
>
> [10] I find support for this view in the decision of the Privy Council in *International Railway Co v Niagara Parks Commission reported in* [1942] 2 All ER 456 a case dealing with the question of the Commission being a corporate body and whether it could be sued. See the judgment of Luxmoore LJJ pp 5–7 and I quote:
>
> The Act of incorporation plainly constitute the commission as a corporation

with a separate legal entity, and in some, at any rate, of its powers it was obviously recognised that it would have contractual capacity separate from the Crown - eg, the power to make itself responsible for the moneys secured by debentures issued under the Act for it is provided that the repayment of the moneys secured by the debentures 'may be guaranteed by the Crown'. This provision would be meaningless if the Commission was not to be under any liability in the first instance.

The Court of Appeal for Ontario also appears to have ignored these important words, for there is no reference to them in the judgment of Mc Tague JA with which the other members of the Court of Appeal for Ontario agreed. Kelly J in his judgment referred to the Commission, not only as being the agent or servant of the Crown, but also as 'an emanation of the Crown'. The latter phrase is also used by Mc Tague JAA. Their Lordships are unable to appreciate the precise meaning intended to be attributed to this phrase by the courts below. If it is intended to refer to the commission in some capacity other than that of agent or servant, it is impossible to ascertain from the judgments delivered what the legal significance of that capacity may be. The word 'emanation' is hardly applicable to a person or a body having a corporate capacity. Its primary meaning is that which issues or proceeds from some source, 'and it is commonly used to describe the physical properties of substances (eg Radium) which give out emanations of recognisable character. The words seem first to have been used by Day J in *Gilbert v Trinity House Corpn*. In his judgment in that case, Day J said, at p 801:

> The Trinity House, to my mind, is not in the position of a great officer of state. It is nothing more than an amalgamation by authority of state of a vast number of bodies having general authority over the lighthouses and beacons and buoys throughout the country for the general convenience. It is a corporation with very great powers vested in it by statute, but in no possible sense can it be deemed to represent the Crown. All the great officers of state are, if I may say so, emanations from the Crown. They are delegations by the Crown of its own authority to particular individuals. That is not the case with the Trinity House, which has its nature and origin defined with sufficient clearness to enable us to say that at any rate it is in no sense an emanation from the Crown, nor in any way whatever a participant of any royal authority.

The judge in the passage quoted seems to use the word as synonymous with servant or agent, and in no other sense. Their Lordships are of opinion that it would avoid obscurity in the future if the words 'agent or servant' were used in preference to the inappropriate and undefined word 'emanation'.

[11] I also refer to the decision of the Court of Appeal in *Tamlin v Hannaford reported in* [1949] 2 All ER p 327, and the judgment of Lord Denning at p 2 of the judgment and I quote:

> The Transport Act, 1947, brings into being the British Transport Commission, which is a statutory corporation of the kind comparatively new to English law. It has many of the qualities which belong to corporations of other kinds to which we have been accustomed. It has, for instance, defined powers which it cannot exceed, and it is directed by a group of men whose duty it is to see that those

powers are properly used. It may own property, carry on business, borrow and lend money, just as any other corporation may do, so long as it keeps within the bounds which Parliament has set, but the significant difference in this corporation is that there are no Shareholders to subscribe the capital or to have any voice in its affairs. The money which the corporation needs is raised, not by the issue of Shares, but by borrowing, and its borrowing is not secured by debentures, but is guaranteed by the Treasury. If it cannot repay, the loss falls on the Consolidated Fund of the United Kingdom, that is to say, on the taxpayer. There are no Shareholders to elect the Directors or to fix their remuneration. There are no profits to be made or distributed. The duty of the corporation is to make revenue and expenditure balance one another, taking, of course, one year with another, but not to make profits. If it should make losses and be unable to pay its debts, this property is liable to execution, but it is not liable to be wound-up at the suit of any creditor. The taxpayer is the universal guarantor of the corporation. But for him it could not have acquired its business at all, nor could it now continue it for a single day. It is his Guarantee that has rendered Shares, debentures and such like all unnecessary. He is clearly entitled to have his interest protected against extravagance or mismanagement.

There are other persons who have also a vital interest in its affairs. All those who use the services which it provides — and who does not — and all whose supplies depend on it — in short, everyone in the Land — is concerned in seeing that it is properly run. The protection of the interests of all these — taxpayer, user and beneficiary is entrusted by Parliament to the Minister of Transport. He is given powers over this corporation which are as great as those possessed by a man who holds all the Shares in a private Company, subject however, as such a man is not, to a duty to account to Parliament for his stewardship. It is the Minister who appoints the Directors — the members of the commission — and fixes their remuneration. They must give him any information he wants, and lest they should not prove amenable to his suggestions as to the policy they should adopt, he is given power to give them directions of a general nature in matters which appear to him to affect the notional interest, as to which he is the sole judge, and they are then bound to obey. These are great powers, but still we cannot regard the corporation as being his agent, any more than a Company is the agent of the Shareholders or even of a sole Shareholder. In the eye of the law the corporation is its own master and is answerable as fully as any other person or corporation. It is not the Crown and has none of the immunities or privileges of the Crown. Its servants are not Civil servants, and its property is not crown property. It is as much bound by Acts of Parliament as any other subject of the King. It is, of course, a public authority and its purposes, no doubt, are public purposes, but it is not a government department nor do its powers fall within the province of government.

[12] In my view, if ever there was a Contract between the Plaintiffas pleaded, it should be with the Minister of Finance Incorporated (MOF Inc) and since the corporation is not a party in this suit, the plaintiff's claim should stand dismissed. Counsel for the plaintiff argues the definition of Special Shareholder includes the Minister, Representative or any person acting on behalf of the Government of Malaysia. I am of the view, the said Act is clear and the Minister acts as a corporation

A and such an interpretation of the clause in the articles would defeat the provisions of the said Act and cannot be sustained. I therefore find the plaintiff's contract if any is with the MOF Incorporated and therefore since MOF Incorporated is not a party to the action, the claim should stand dismissed.

B **[536]** I do not see how this case advances the position of the defence. This case stands for the proposition on the distinction between the Finance Minister and the MOF Inc on the issue of contractual nexus in a civil case.

C **[537]** I accept the argument that the accused acted as shareholder and did not as MOF Inc act on behalf of SRC. It is trite that shareholders are not agents nor fiduciaries of the company. A shareholder resolution is not a resolution of the company (*John Hancock Life Insurance (Malaysia) Bhd v Menteri Sumber Manusia Malaysia and Ors* [2004] 3 MLJ 227). And the powers of the directors and that of the shareholders are mutually exclusive. The shareholders cannot interfere with or override the management decisions of the board of directors (*Tengku Dato' Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Bhd and another appeal* [2018] 2 MLJ 177).

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E **[538]** But the defence goes on to formulate the argument that since a shareholder is not an 'agent' of the company and owes no fiduciary duties towards the company, the acts of MOF Inc cannot therefore be equated to acts of an 'agent' of SRC.

F **[539]** This is a point that I have already addressed. The 'agent' in the context of a CBT offence under s 409 is specifically defined in s 402A in the same Code, and does not apply the traditional principal-agency relationship.

G **[540]** A more substantive argument of the defence is that the capacities of Prime Minister, Minister of Finance in relation to SRC are not personal to the accused as these are qua functionary of the government vis a vis an MOF Inc entity. As such for the purposes of s 409 of the Penal Code, a power given to a public functionary in such capacity over the affairs of a government linked company cannot be equated to a capacity which can be said to create entrustment or dominion over assets or property of SRC.

H

[541] The defence refers to the Indian Supreme Court decision in *R Sai Bharathi v J Jayalalitha & Ors* AIR 2004 SC 692. In that case, the Government of Tamil Nadu established a Tamil Nadu Small Industries Corp Ltd ('TANSI'). It was registered under the Companies Act 1956 as a government company. Not unlike SRC, the entire shares in TANSI were held by the government. The memorandum of association of the company stated that TANSI was formed 'to take over from the Government of Tamil Nadu any of their production and/or

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servicing units with the rights and liabilities of the Government of Tamil Nadu so far as they relate to such units'. A

[542] Article 72 of its articles of association empowered the Government of Tamil Nadu to appoint all the directors with the power to remove any director from time to time. The chairman can reserve for the approval of the government any proposals or decisions of the board in respect of any of the matters regarding: (a) increase or reduction of the capital of the company; (b) loan granted by the company or giving of a guarantee or any other financial assistance to any person or concern; (c) winding up of the company; and (d) any other matter which in the opinion of the chairman be of such importance to as to be reserved for the approval of the government. In respect of any proposal or decision of the board reserved for the approval of the government no action shall be taken by the company until approval to the same has been obtained. The government also exercises the power to issue directives or instructions as it may deem fit in regard to finances and the conduct of the business and affairs of the company and the directors shall duly comply with and give effect to such directives or instructions. B C D

[543] The then Chief Minister of Tamil Nadu (or referred to in the judgment as A1) was charged, inter alia, under s 409 of the Indian Penal Code because some of the undertakings of TANSI were eventually transferred to a company in which she had interest in. E

[544] The Supreme Court held that in her capacity as Chief Minister, she could not be held to have been entrusted with or have dominion over the property of TANSI. The relevant passage from the judgment of Rajendra Babu J, writing for the Supreme Court, is hereunder reproduced: F

> The next charge we have to deal with is one arising under Section 409 IPC. Criminal breach of trust has been defined under Section 405 IPC. For the offence of criminal breach of trust by a public servant the punishment is provided under Section 409 IPC. The properties in question belongs to TANSI, a corporation which is a separate and distinct entity from the Government and the properties are held by it as owner and has complete control over the same except when the said properties are to be alienated, approval of the Government has to be obtained as provided under the Articles of Association of the said Corporation. In a case of this nature, where there is no dominion over the properties by a Chief Minister or a Minister it cannot be treated as entrustment of the properties creating a trust which is an obligation annexed to the ownership of the properties and arises out of the confidence reposed and accepted by the owner. Indeed there is no material in the whole case to come to the conclusion that any such trust has been or deemed to have been created in respect of the said properties and that the relationship between A-1 and TANSI is one of trustee and beneficiary. Therefore, the ingredients of Section 409 IPC are not attracted to the present case at all. There is absolutely no entrustment of the properties in any manner, which allows a dominion over it G H I

except approving or disapproving, an act on the part of the Corporation either to sell or to alienate the properties. It cannot be said that a public servant who holds a particular portfolio and has an element of supervisory control in certain matters, has a dominion over the property so as to exercise any legal incidents attached to the right of ownership. Therefore, there was no entrustment of the said properties and it cannot be said that A-1 had dominion over the said properties either as the Chief Minister or as the Minister of Industries and in any case, the evidence does not establish the ingredient of dishonest disposal or conversion of property for personal use. Thus the charge under the aforesaid section is also not established as rightly held by the High Court.

[545] The defence submitted that the powers of the Chief Minister over TANSI were even more supervisory than that of the Prime Minister, Finance Minister or advisor emeritus in respect of SRC. That may be so but *R Sai Bharathi v J Jayalalitha & Ors* does not support the position of the accused. Despite what the defence submits this decision is not on all fours with its contention that a functionary capacity cannot create an entrustment under s 409 of the Penal Code.

[546] There are three factors that plainly demonstrate why the decision *R Sai Bharathi v J Jayalalitha & Ors* cannot be applied to the SRC situation. First, the sole shareholder of TANSI is the Government of Tamil Nadu. The accused was the Chief Minister of the Government of Tamil Nadu. The shareholder of SRC is MOF Inc. As stated earlier, under the Minister of Finance (Incorporation) Act 1957, the accused, as the Finance Minister was 'statutorily incorporated' as MOF Inc. The accused, being the Finance Minister was MOF Inc.

[547] The Supreme Court in *R Sai Bharathi v J Jayalalitha & Ors* emphasised the fact that the relevant properties belonged to TANSI, a corporation which is an entity separate and distinct from the Government of Tamil Nadu. TANSI as the owner had complete control except that under its articles of association when the properties are to be alienated, approval of its shareholder, the Government of Tamil Nadu has to be obtained. This, the Supreme Court ruled therefore meant that there is no dominion over the properties by a Chief Minister or a Minister and nor can it be treated as entrustment of the properties. On the other hand, although the properties of SRC belonged to it and not its shareholder, MOF Inc the accused was for all intent and purposes the MOF Inc, as fortified by virtue of the Minister of Finance (Incorporation) Act 1957. In contrast the Chief Minister was not in any capacity the shareholder of TANSI, but was only the head of the Government of Tamil Nadu. It was the government and not the Chief Minister who was the shareholder of TANSI.

[548] Secondly, relevant powers on the appointment and removal of directors of TANSI and on reserved matters were stated in the articles as being vested in

the Government of Tamil Nadu, not the Chief Minister. I repeat that the government was also the sole shareholder of TANSI. In the case of SRC, the articles confer the authority to hire and fire its directors and on approval of any amendments to the company's M&A on the Prime Minister, as well as the right to be consulted on the advisor emeritus which must be the Prime Minister. The Prime Minister and the advisor emeritus, who had authority in SRC were not however the shareholder of SRC. Its sole shareholder was MOF Inc.

[549] Thirdly the Chief Minister was accused of among others, CBT. She was however neither in person nor in the capacity of her office ever a shareholder of stated to have an authority over TANSI in the M&A of TANSI. In the case of SRC, in contradistinction, the accused was by virtue of being the Prime Minister (and as such also as the advisor emeritus) vested with the requisite authority under the M&A of SRC. In addition the accused, given his office of the Finance Minister which by law made him MOF Inc was also the sole shareholder of SRC.

[550] It is thus readily observed that although the Supreme Court in*R Sai Bharathi v J Jayalalitha & Ors* gave emphasis on the well-established company law principle that the property of a company like TANSI (or SRC for that matter) belongs to the company (like TANSI and SRC), and not its shareholder (the Government of Tamil Nadu or MOF Inc respectively), which the Supreme Court then held did not result in an entrustment on the part of the Chief Minister over the property of TANSI, it is manifest that the extent of the involvement of the Chief Minister as the accused in that case which was only through her indirect position as the head of the government is very different from that of the accused in the instant case before this court.

[551] In the SRC situation, at the risk of repetition, the accused was directly conferred with the authority as the Prime Minister and the advisor emeritus as stated in the M&A of the company, in addition to be the shareholder of SRC as MOF Inc.

[552] As such the contention that *R Sai Bharathi v J Jayalalitha & Ors* which the defence submits stands for the proposition that a power given to a public functionary in such capacity over the affairs of a government linked company such as SRC cannot amount to an entrustment or dominion over the property of the company for the purposes of s 409 of the Penal Code is devoid of merit given the patent differences in the factual matrix of the two cases.

Whether s 402A of the Penal Code is widely drafted and include shadow director

[553] It has to be highlighted, although the matter was not mentioned in the submissions of both sides, that whilst the evidence is cogent in demonstrating that the directors of SRC were accustomed to act in accordance with the wishes of the accused, and it may even be a classic case of a shadow director, as stated earlier however, s 402A does not include the usual definition of how a shadow director is commonly described. Nevertheless, I do not see any compelling justification that could deny the application of the definition of a director under s 402A of the Penal Code. I say so for two principal reasons.

[554] First, even if it was true that a shadow director is not within the scope of the definition of director under s 402A of the Penal Code, evidence in this case would in any event establish that the accused could be considered to fulfil the definition of director in s 402A all the same.

[555] Section 402A defines a director broadly in two categories. First is one who occupies the position of a director of a company; and secondly a person who acts or issues directions or instructions in a manner in which directors of a company are accustomed to issue or act.

[556] Evidence has now shown that the accused as MOF Inc had issued directions and instructions by way of shareholder resolutions in a manner the directors of the company are accustomed to do. Which was precisely what had happened for the many directors' circular resolutions issued by the directors of SRC, which effectively mirrored and followed those of the MOF Inc. executed by the accused.

[557] I emphasise that even in that context, s 402A speaks of two principal scenarios, that either the person in question who either acts or issues directions or instructions in a manner in which directors of a company are accustomed to issue or act. A de facto director may do both, but in this case before this court, it may not be entirely accurate to state that the accused had acted in the manner the directors of SRC are accustomed to act. For example, in respect of attendance of meetings of the board of directors, which the accused never did. Here, the involvement of the accused which qualified him being a director under s 402A, came about predominantly from his issuance of the shareholder resolutions.

[558] The second reason is this. The formulation of s 402A is not definitive in stating the situations how one can in law for the purposes of the stated parts in the Penal Code be deemed to be a director. The definition of director is drafted as including the persons specified therein. It is plainly not exhaustive.

[559] In my view given that case law authorities and s 4 of the Companies Act 1965, as repeated word for word in s 4 of the Companies Act 2016 already in manifest fashion recognises the different types of director under the law.

[560] Furthermore to say that the concept of shadow director does not apply to Penal Code would not be accurate since the offences created by the Companies Act 1965, inclusive of the serious ones against the directors of a company does not exclude those acting in the role as shadow directors.

[561] There is therefore no legal impediment to s 402A being read widely to include shadow directors as well. It bears repetition that *Yap Sing Hock & Anor v Public Prosecutor* was a pre-s 402A decision. As I have mentioned, s 402A itself was drafted widely to admit of other types of directors now not specifically stated.

[562] It bears emphasis that the significance of the finding that the accused was a 'shadow director' or a director within the meaning of s 402A of the Penal Code, is that the accused would be subject to the same duties and obligations of a director under the law, and thus stood in a position which owed a fiduciary duty to the company similar to any duly appointed director. This includes the duty of such a director like the accused to act in the best interests of the company or SRC at all times (see *Halsbury's Laws of England*, 4th Ed Reissue, Vol 7(I) p 429).

[563] Furthermore, it is settled law that a director is not only a fiduciary but also act as a trustee for all the assets and properties of a company. The Supreme Court, in the case of *Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449 had in the judgment written by Hashim Yeop A Sani SCJ occasion to state the following:

> Issue G:
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> The finding of the learned judge was set aside and this court held that the first appellant company is entitled to recover damages against the third respondent, Yap Fui Chong, for breach of fiduciary duty as director of the first appellant company.
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> ...
>
> It is clear therefore from Yap's own evidence that he knew that the plaintiff company was receiving no benefit from the charge and transfers. In these circumstances, Yap was indeed in breach of the duty he owed to the company to act in its best interest. The principle upon which Yap's liability is grounded can be found in *Belmont Finance Corporation v Williams Furniture Ltd & Ors (No 2)* [1980] 1 All ER 393 in the following passage at p 405:
>
> > A limited company is of course not a trustee of its own funds: it is their beneficial owner; but in consequence of the fiduciary character of their duties, *the directors of a limited company are treated as if they were trustees of those funds of the company*

> *which are in their hands or under their control, and if they misapply them they commit a breach of trust* (*Re Lands Allotment Co* [1894] 1 Ch 616 at pp 631–638, per Lindley and Kay LJJ). *So if the directors of a company in breach of their fiduciary duties misapply the funds of their company so that they come into the hands of some stranger to the trust who receives them with knowledge (actual or constructive) of the breach, he cannot conscientiously retain those funds against the company unless he has some better equity. He becomes a constructive trustee for the company of the misapplied funds.* (Emphasis added.)

[564] Although this principle is often applied to a duly appointed directors of a company or the de jure directors, the same ought to be applicable to those the law considers as shadow directors or directors under s 402A of the Penal Code. The rationale here is that the ones in control, namely the directors in the usual case should be accountable to the company for the assets and properties which come under the controlling supervision of the same. Similarly those whom the law construes as having control over the other directors and the assets of the company, such as a shadow director or the director under s 402A of the Penal Code, should all the more be made to be no less responsible than the ordinary directors.

Whether subservience of the board to shadow director necessary to prove presence of latter

[565] Significantly, the contention of the defence that the accused was not a shadow director of SRC is premised, I reiterate, on Millett J's decision in *Re Hydrodam (Corby) Ltd*. In that case, Millett J explained that a shadow director is one who does not purport to be a director, for 'he lurks in the shadows, sheltering behind others who, he claims, are the only directors of the company to the exclusion of himself'. On the other hand, a de facto director purports to be a director without having been validly appointed as one.

[566] The case made it clear that what, under the circumstances, a company would have a board of directors claiming and purporting to act as such; and secondly, a pattern of behaviour whereby the directors did not exercise any discretion or judgment of their own, but acted in accordance with the directions of others.

[567] Further there are case law authorities which state that whether any particular communication from the suspected shadow director, whether by words or conduct, is to be construed as a direction or instruction ought to be objectively examined by the court in the light of all the evidence. Even advice, provided it is not professional advice may be a direction or instruction. Recent English cases have also ruled that it is not necessary to show that the validly appointed directors had cast themselves in a subservient role or surrendered

their respective discretion to the shadow director. And it was also held that in spite of the use of the term 'shadow directors' it is not essential to characterise the person as 'lurking in the shadows', for it is possible for a person to be a shadow director quite openly.

[568] As I have stated, the accused could be considered, on evidence, to not just be a shadow director, but also a director as defined in s 402A of the Penal Code. But more importantly, the parameters enunciated by Millet J in *Re Hydrodam (Corby) Ltd* have since been reviewed and the very concept of shadow director further refined by the English Court of Appeal in the case of *Secretary of State for Trade and Industry v Deverell* [2001] Ch 340.

[569] In *Deverell*, the Secretary of State for Trade sought to disqualify certain individuals as directors and had to show that the activities of these individuals in certain companies were 'as directors'. Morritt LJ, delivering the leading judgment for the Court of Appeal, examined the statutory definition of shadow director and set out the following key propositions relevant for present purposes.

[570] First, the objective of the legislation is to identify those, other than professional advisers, who wield real influence in the corporate affairs of the company, but that it is not necessary that such influence should be exercised over the whole spectrum of its activities. It is thus not necessary to show that the person gives directions or instructions on every matter on which the directors act.

[571] Secondly, whether any particular communication from the suspected shadow director, whether by words or conduct, is to be construed as a direction or instruction ought to be objective examined by the court in the light of all the evidence. Even advice, provided it is not professional advice may be a direction or instruction.

[572] Thirdly, it is not necessary to show that the validly appointed directors had cast themselves in a subservient role or surrendered their respective discretion to the shadow director. And it was also held that in spite of the use of the term 'shadow directors' it is not essential to characterise the person as 'lurking in the shadows', for it is possible for a person to be a shadow director quite openly.

[573] This decision states that there is no contradiction in the situation where despite a person being a shadow director, the board of directors continues to exercise some discretion or judgment in areas where the shadow director does not give instruction or express a wish. This was exactly the situation experienced by the directors of SRC during the material time.

A **[574]** In *Deverell*, two individuals were contended to be shadow directors given their substantial role in the governance of the company and the fact that the validly appointed directors consistently acted upon their instructions.

B **[575]** In that case, Morritt LJ held that the position of one of the two, Mr Deverell, in the company 'gave to his advice the potency of directions or instructions' even though he did not tell the directors what to do. It was observed that the concepts of 'direction' and 'instruction' did not exclude the concept of 'advice' for all three shared the common feature of 'guidance'. Further, both men appeared as men of importance whose words were listened C to, and the directors were accustomed to acting on their advice. They were as such held to be shadow directors.

[576] Although case law prior to *Deverell* seem to require the de jure directors D to surrender their discretion to the shadow director, the position in light of and post *Deverell* strongly suggests an expansion of the concept of a shadow director. The High Court at the first instance held among others that what the court has to find is that the board does what the shadow tells it and exercises no or at least no substantial independent judgement. This was reversed on appeal, E where Morritt LJ who wrote the leading judgment of the Court of Appeal (which was not appealed) concluded, vis a vis the concept of a shadow director that the purpose of the legislation in question is to identify those with 'real influence in the corporate affairs of the company' (other than professional advisers).

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[577] Significantly, it was also ruled that whether any communication from an alleged shadow director to the company is a 'direction or instruction' must be objectively ascertained in the light of all the evidence, such that it is even unnecessary to enquire into the understanding of the alleged shadow director's G expectation that he will be obeyed or that of the directors. This means that it would be more likely that a third party, such as a beneficial owner of a company, who communicates advice or guidance to the de jure directors is a shadow director. It is the evidence of the communication and its consequence that H matters. It is thus not necessary to show that the directors had surrendered their discretion, although such surrender would inevitably lead to the conclusion that a person communicating the advice to the directors proper is a shadow director.

I **[578]** I have shown earlier that the accused has been found to be a shadow director of SRC based on the traditional test for a shadow director as pronounced in *Re Hydrodam (Corby) Ltd*. This conclusion is in light of the refinement of this concept in *Deverell* further fortified and rendered more inescapable.

[579] To further dwell on the development of the law on this specific subject, I should add that at the oral submissions session learned counsel for the accused made reference to a UK Supreme Court of *Holland v Commissioners for Her Majesty's Revenue and Customs and another* [2010] UKSC 51 ('*Re Paycheck*') which considered the test for a de facto directorship and touched on the concept of shadow directorship.

[580] It appears that under English law there could as a result of this decision no longer a distinction between the concepts of de facto and shadow directorship. Significantly, *Paycheck* suggests that the law has gradually moved away from a prescriptive approach to the identification of de facto and shadow directors and instead to focus more on the question as to who has real influence on the affairs of the corporate entity, and that is to be performed considering all the circumstances of the case.

[581] But as I remarked at the hearing, *Paycheck* dealt more with the concept of de facto directors than shadow directors. Lord Hope stated that to identify a de facto director, all the relevant factors must be taken into account, and Lord Collins in the leading judgment of the court revisited the development of the law on de facto directors and observed that expressions employed to describe de facto directors in *Re Hyrodam* such as 'purports to be a director' or 'held out as a director' whilst relevant were not necessary considerations.

[582] Nevertheless, as stated by learned counsel, Lord Collins went on to conclude that once the concept of de facto director was divorced from the unlawful holding of office, the distinction between de facto directors and shadow directors was eroded as the distinction could not be sustained given the extension of the concept of de facto directorship.

[583] Accordingly, following *Paycheck*, for both de facto and shadow director, it was necessary for the court to scrutinise consider such matters as the taking of major decisions by the individual, which might be through instructions to the de jure directors, and the evaluation of his real influence in the affairs of the company.

[584] This is a clear causal connection between the instruction or wish of the shadow director and the action actually taken by the directors, whilst at the same time the same board can exercise a certain level of independent judgment without that being inconsistent with the presence of a shadow director.

[585] Again this development does no violence to the finding that on the evidence the accused was also a shadow director of SRC.

Whether capacity as agent arises from the accused's position as Prime Minister, Finance Minister and advisor emeritus as well

[586] For the same reasons it is also accurate to state that the accused could also fall within the definition of 'agent' in s 402A of the Penal Code by virtue of the words 'in any other capacity' as stated in the charges as the Prime Minister, Finance Minister and the advisor emeritus. This is in respect of his official role as the advisor emeritus of the company.

[587] Acting in his capacity as the Prime Minister even since the formation of SRC, the accused dictated the direction of SRC. The accused's capacity as a director under s 402A and advisor emeritus of SRC made him liable as an 'agent' under s 402A of the Penal Code.

[588] The accused was appointed as advisor emeritus only because of the accused himself had granted his consent as the Prime Minister and as the sole shareholder of SRC representing MOF Inc for the company to amend its articles to insert the provision in the new article 117 on the creation of the position of the advisor emeritus with the powers as contained therein. This resulted again in the board of directors issuing a directors' circular resolution (exh 511) to adhere to the instructions. The accused dictated the direction of SRC from the time of its incorporation, given his roles as stated in the articles. His other roles as director as defined under s 402A and as the advisor emeritus all made him an 'agent' under s 402A of the Penal Code.

[589] I must reiterate that the accused was at all material times the Prime Minister and in that capacity was named in the M&A of SRC and given specific powers, including that of appointing and termination directors of the company (P15). As correctly argued by the prosecution, the defence has admitted in its written submissions that the accused's power was superior to that of SRC in the sense that its board of directors required the approval of the accused before it could implement certain acts, and that the accused did undertake certain acts in exercise of his powers under the M&A In that sense, it was the accused who was actually making decisions on behalf of SRC, exercising his powers vested in the M&A.

[590] I have also touched on the fact that s 402A of the Penal Code defines 'agent' widely, which also includes 'other officer of any company ... or in any other capacity either alone or jointly with any other person and whether in his own name or in the name of his principal *or not*'. As I have stated, the words 'either alone or jointly' and 'whether in his own name or in the name of his principal or not' are manifest in excluding the requirement of there being a 'principal' as asserted by the defence.

[591] In my judgment, the evidence adduced by the prosecution has established that the accused was in fact the controlling mind behind SRC when he gave specific directions pertaining to the key aspects on the operations of SRC, principally as documented in the shareholder minutes discussed earlier.

[592] All the requirements to demonstrate that the accused was a 'shadow director' as formulated by either Millet J in *Re Hydrodam (Corby) Ltd* (and subsequently referred to in the Malaysian Court of Appeal decisions in *Datuk Sahar bin Arpan v Public Prosecutor* and *Sazean Engineering & Construction Sdn Bhd v Bumi Bersatu Resources Sdn Bhd*) or the English Court of Appeal in *Deverell* which refined and made the concept of shadow director more expansive, have all been more than fulfilled, given the strength of the evidence before this court.

[593] And further, the definition of 'director' under s 402A too has been met by the evidence and in any event this definition of director in s 402A is sufficiently wide to admit of a shadow director in this case, both the *Re Hydrodam (Corby) Ltd* and the *Deverell* types. In short, as a director under s 402A of the Penal Code, the accused is thus an agent within the meaning of s 402A for the purposes of s 409 of the Penal Code subject to the three CBT charges against the accused.

[594] Thus, the law deems the accused to be a director within the meaning of s 402A of the Penal Code. It follows that the accused acted in his capacity as an agent within the meaning of s 409 of the Penal Code.

SECOND INGREDIENT OF CBT — WHETHER THERE IS ENTRUSTMENT

The requirement under s 409

[595] The second ingredient for a CBT offence is the need for the prosecution to show entrustment on the part of an accused with the property in question. There can be no CBT unless an accused is proved to have been entrusted with property or dominion over property.

[596] It is of interest to mention that in the absence of the element of entrustment, some of the cases may just amount to criminal misappropriation. Section 405 refers to misappropriation of the entrusted property. And the question would be whether an accused had misappropriated the property with which the accused had been entrusted, such as funds of the company.

[597] The term 'entrustment' may be defined simply to refer to a situation where a property owned by A is handed over to B, who holds the property in

A trust (in a broad sense and not in equity) for A. But elucidation on some fundamental aspects on entrustment is however apposite for present purposes.

[598] Based on the drafting of s 405, first, a person may be entrusted either with property or with 'dominion' over property. The rationale behind this is not difficult to appreciate. Thus even if a person is not entrusted with the property itself, he may exercise de facto control.

[599] The distinction between entrustment with property and entrustment with dominion may be exemplified by the person who has overall control of an operation and another who has day to day control of merely an aspect of the operation. It can generally be construed that the former is entrusted with dominion whilst the latter, with property. Ultimately however the determinant calls for the resolution of a question of evidence on the degree of control exercised by an accused.

[600] This may be illustrated in *Sinnathamby v Public Prosecutor* [1948–1949] MLJ Supp 75, where an employee at a quarry had left behind some stone which made possible their unauthorised removal by another party, which did happen. The High Court ruled that the employee had been entrusted with dominion because notwithstanding his superior had overall responsibility, the employee was in a position, by virtue of his contract of employment, to exercise sufficient control which satisfied the element of 'dominion'.

[601] Secondly, this is also consistent with the provision of s 405 which also states that a person may be so entrusted 'either solely or jointly with any other person'. This must mean that first, a general degree of control is sufficient and secondly, there is no necessity to show exclusive or sole dominion. In *Public Prosecutor v Cho Sing Koo & Anor* [2015] 4 MLJ 689; [2015] 4 CLJ 491 on the issue pertaining to the ingredient of entrustment with dominion over property it was held in the judgment written by Abdul Rahman Sebli JCA (as he then was):

> [16] In her judgment the learned sessions court judge found that the respondents had no exclusive power or dominion over Ganad Media's funds as such power was in the hands of PW2, being the chief executive officer and the 'brain and mind' of the company. She described PW2 as the most powerful person in Ganad Media.
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> [17] The learned sessions court judge used such words as 'ekslusiviti dan/atau dominasi', 'ekslusif kuasa', 'dominasi kuasa penuh', 'kuasa ekslusif' in determining whether the respondents had dominion over Ganad Media's funds. We consider this to be a misdirection. In a prosecution under s 409 of the Penal Code it is sufficient for the prosecution to prove dominion by establishing control or power of disposal over the property. There is no requirement to prove dominion to the exclusion of all other persons.

[602] Thirdly, case law authorities have established that entrustment with dominion over property requires that there must be prior evidence of entrustment before dominion. Dominion without entrustment, vis a vis the property, will not do.

[603] In the Supreme Court decision in *Public Prosecutor v Lawrance Tan Hui Seng* [1993] 4 CLJ 221 (which followed the decision of the Supreme Court of India in the case of *Velji Raghavji Patel v State of Maharashtra* 1965 AIR 1433), Edgar Joseph Jr SCJ, who delivered the judgment for the Supreme Court authoritatively made this point clearly in the following terms:

> Clearly, under s 405, the very first ingredient which the prosecution must prove is that the Accused was either entrusted with the property the subject of the charge or was entrusted with dominion over that property. In the case of entrustment of dominion over that property, the mere existence of that person's dominion over property is not enough. The prosecution must go further and show beyond reasonable doubt that his dominion was the result of entrustment or, in other words, that the term 'entrustment' in s 405 governs not only the words 'with the property' immediately following it but also the words 'or with any dominion over the property' occurring thereafter.

[604] And fourthly, s 405 also speaks of one who is 'in any manner entrusted with property'. This means that entrustment must not, for example, necessarily arise from any fraudulent conduct of an accused. This was borne out clearly in a case referred to by the prosecution in its written submissions, being a decision of the Supreme Court of India in *The Superintendent and Remembrance of Legal Affairs, West Bengal v SK Roy* 1974 AIR 794 which stated:

> 12. To constitute an offence under Section 409, Indian Penal Code it is not required that misappropriation must necessarily take place after the creation of a legally correct entrustment of dominion over property. The entrustment may arise in 'any manner whatsoever'. That manner may or may not involve fraudulent conduct of the accused. Section 409, Indian Penal Code covers dishonest misappropriation in both types of cases; that is itself fraudulent or improper and those where the public servant misappropriation what may have been quite properly and innocently received. All that is required is what may be described as 'entrustment' or acquisition of dominion over property in the capacity of a public servant who, as a result of it, becomes charged with a duty to act in a particular way, or, at least honestly.

[605] And because of such language in s 405, nor is it the requirement of the law that the entrustment of the property must be made directly by its owner to the accused. The Court of Appeal in *Aisyah bt Mohd Rose & Anor v Public Prosecutor* [2016] 1 MLJ 840; [2016] 1 CLJ 529 made this abundantly plain where Her Ladyship Tengku Maimun Tuan Mat JCA (now Chief Justice) stated thus:

A [37] We accept that the first appellant was not entrusted directly with the cheques by the companies but it cannot be denied that through the intermediaries, the cheques ended up with the second appellant and from the second appellant, to the first appellant. In our view 'in any manner entrusted' is wide enough to encompass not only the property being directly entrusted by the owner to the accused but also
B property entrusted by the owner to the accused indirectly, as in the instant appeal, entrusted to the first appellant by virtue of her position as an agent of the bank.

[38] We find support in the case of *Som Nath v State of Rajashtan* [1972] AIR SC 1490 which states:

C > Section 405 merely provides, whoever being in any manner entrusted with property or with any dominion over the property, as the first ingredient of the criminal breach of trust. The words 'in any manner' in the context are significant. The s. does not provide that the entrustment of property should be by someone or the amount received must be the property of the person on whose
D > behalf it is received. As long as the accused is given possession of property for a specific purpose or to deal with it in a particular manner, the ownership being in some person other than the accused, he can be said to be entrusted with that property to be applied in accordance with the terms of entrustment and for the benefit of the owner. The expression 'entrusted' in section 409 is used in a wide sense and includes all cases in which a property is voluntarily handed over for a
E > specific purpose and is dishonestly disposed of contrary to the terms on which possession had been handed over. ...

[42] Even if the submission of learned counsel is to be accepted that the element of 'entrusted with the property' was not proven, we find that the first appellant clearly
F had dominion over the cheques. In *Sinnathamby v PP* [1948–49] MLJ Supp 75; [1948] 1 LNS 160 the principle on dominion is stated as follows at p 76:

G > ... applies not merely in cases where the exercise or possession of dominion over property is one of the legal incidents of the contract of service but in every case where by virtue of the existence of contract of service the accused person is in fact in a position to exercise dominion.

[43] In the present appeal, we are satisfied from the facts that the first appellant had dominion over the cheques. Without such dominion, the first appellant would not be able to do what she had done in terms of processing the crossed cheques which
H eventually led to the crediting of the cheques into the third party's account.

Evidence of entrustment

I **[606]** In my judgment, for the second element of the offence of CBT for the three charges, that is entrustment with dominion over property, for substantially the same reasons concerning evidence on the finding of the controlling position of the accused as a shadow director and as a director as defined under s 402A of the Penal Code, I also find that the accused had the entrustment with dominion over the property of SRC.

[607] I reiterate that the term 'criminal breach of trust' is defined in s 405 of the Penal Code to include dishonest misappropriation by any person being *in any manner* entrusted with property, or with any dominion over property either solely *or jointly* with any other person.

[608] CBT offences could arise from many different factual situations. Evidence must be led in all cases to show that an accused has been entrusted with the property in question. And this in turn depends very much on the capacity and role of the accused in the organisational structure vis a vis his control, if any over the relevant property of the entity. The illustrations in s 405 of the Penal Code tell of entrustment of properties on the part of an executor of wills, a warehouse keeper, an investment agent, a clerk and a carrier. Certain positions however, such as company directors would invariably carry the responsibility over the preservation of company assets by virtue of their statutory duty of managing the business and affairs of the company (see for example s 131B of the Companies Act 1965).

[609] Thus, in *Public Prosecutor v Cho Sing Koo & Anor* [2015] 4 MLJ 689; [2015] 4 CLJ 491, the Court of Appeal also observed:

> [18] *Being the directors of Ganad Media and having power to sign the company's cheques, clearly the respondents had control and power of disposal over the company's funds. The fact that there were others in the company who had power to sign the company's cheques does not dilute the respondents' control and power of disposal over the funds.* The court is not concerned with the power of others over the funds but whether the respondents were actuated by dishonest intention when they disposed of the company's property. Under the law it is not even a defence to show that the property was openly appropriated or that the appropriation was duly recorded and entered in the books and accounts of the company: see s 409A of the Penal Code. (Emphasis added.)

[610] The accused was never a director appointed to the board of directors of SRC. But as has been discussed earlier, the law deems the accused as either a shadow director or a director as defined under s 402A of the Penal Code (as well as an agent in his capacity as the Prime Minister, Finance Minister and the advisor emeritus of the company). I have earlier referred to the Court of Appeal decision in the case of *Sazean Engineering & Construction Sdn Bhd v Bumi Bersatu Resources Sdn Bhd* [2019] 1 MLJ 495 which had held that a shadow director is treated as a director under the Companies Act 1965 for the purpose of attaching liability as the law attaches on him a fiduciary duty which he owes to the company which he seeks to control.

[611] Similar rationale applies in the context of the definition of a director in the Penal Code. Section 402A specifically provides that the definitions of the four terms contained in that s 402A, namely 'agent', 'company', 'director' and

A 'officer' are applicable for the purposes of the provisions on the offences of criminal misappropriation of property (ss 403 and 404), criminal breach of trust (ss 405–409B) and cheating (ss 415–420).

B **[612]** Clearly, if a duly appointed director is a fiduciary for the company, and has all the powers of management which must extend to the control of properties belonging to the company (typically documented, for examples, in the company's articles of association and in directors' resolutions authorising directors as signatories for the company's bank accounts and for agreements on purchase and sale of properties) the same holds true for a shadow director like C the accused who can influence or control the board of directors or a person also like an accused who in fact had issued directions in a manner in which the directors were accustomed to issue within the meaning ascribed to s 402A of the Penal Code.

D **[613]** Initially formed as a subsidiary of 1MDB, the promoters and first two directors of SRC which included Nik Faisal had already incorporated articles 67 and 116 empowering the Prime Minister (then the accused) to appoint and remove the directors of SRC, and to first consent to any amendments to the E M&A of the company before any could be effected. Approval must have been given by the accused, then a sitting Prime Minister to have him involved in a corporate entity in that fashion, albeit not unlike in very few other key strategic government owned entities, like, notably Petronas (never mind that SRC was never in any time dimension anywhere near Petronas by any standard).

F **[614]** It is difficult to believe and accept that Nik Faisal included the articles without the accused as the Prime Minister knowing. Thus even from its inception, the accused already had entrenched his authority over the company by virtue of the two articles. This already gave him dominion over the assets and G properties of SRC since its formation. And being a director within the meaning of s 402A, the law imposes on the accused entrustment with such dominion over the assets and properties of SRC.

[615] In other words, as was stated in the Indian Supreme Court decision of H *Som Narth Puri v The State of Rajasthan* 1972 AIR 1490 referred to in *Aisyah bt Mohd Rose & Anor v Public Prosecutor* [2016] 1 MLJ 840; [2016] 1 CLJ 529, as long as the accused is given possession of property for a specific purpose or to deal with it in a particular manner, the ownership being in some person other than the accused, he can be said to be entrusted with that property to be I applied in accordance with the terms of entrustment and for the benefit of the owner.

[616] As touched on earlier in the discussion on the s 23 of the MACC Act charge, the accused had also featured prominently in the plan and process to

transfer the entire ownership of shares in SRC from 1MDB to MOF Inc.

[617] In the context of the three CBT charges, evidence on the actions of the accused in the said transfer further demonstrates the steps taken by him that resulted in the accused having been entrusted with dominion over the assets and properties of SRC. This is in the sense of the transfer had the effect of further consolidating the control the accused had over the board of directors of SRC, enabling him to directly issue shareholder minutes as MOF Inc as directions to the board of directors of SRC.

[618] The plan to transfer the ownership of SRC from 1MDB to MOF Inc appears to have been initiated by SRC. SRC requested KWAP for consent to change its ownership to such effect. In a letter from SRC to the Prime Minister (P557) the accused again noted his consent on the letter itself. This evidences a clear wish on the part of the accused to have SRC directly under the control of the accused who was then by operation of law the MOF Inc under s 3 of the Minister of Finance (Incorporation) Act 1957.

[619] This letter (P557), with the notation of agreement expressed by the accused on it, was then delivered to Dato' Mat Noor Nawi (PW44), then the Deputy Secretary General of Treasury with oversight over MOF Inc companies or Bahagian MKD (BMKD), for further action. PW44 testified that his action to execute the process to transfer the ownership of SRC to MOF Inc was to formalise the decision which had already been agreed to by the accused, describing it as a top down decision making process. PW44 in simple terms said thus:

> Dalam kes ini, saya kategorikan sebagai top-down decision making process di mana syarikat menghantar request terus kepada YAB Perdana Menteri dan Menteri Kewangan ...
>
> ... Bergantung kepada minit YAB PM, pertama YAB PM akan minit sila pertimbang sebaik mungkin atau sila kaji jika ini minit beliau maka saya akan gunakan pendekatan yang pertama tadi kita start daripada bawah balik sediakan paper dapatkan sokongan KSP dapatkan persetujuan KSP dan kemudian kepada Yang Amat Berhormat Perdana Menteri apabila diluluskan barulah kita maklumkan kepada syarikat ... yang kedua adalah apabila YAB PM minit atas surat tersebut saya setuju dengan cadangan ini. So, kalau itulah minit YAB PM maka kita just execute the decision okay, tanpa ikut cara tadi ... PM telah memberi persetujuan. So kita just formalize the whole process.

[620] PW44 also disagreed with learned defence counsel's suggestion that the notation of the accused on the letter (P557) was not a decision of the accused but was actually referring the matter to another Minister for review and comments. PW44 maintained that it was a 'top-down decision making process'

and the notation by the accused on the letter was read as the clear decision of the accused, only for PW44 to execute a matter that had already been decided on.

[621] In categorical terms, PW44 testified that, in the case of SRC, unlike the other companies under MKD, it was a 'top-down decision making process' whereby he had no other choice but to execute the instructions of the Accused. PW44 also explained the contents of P557 where it was stated in the letter 'I write to seek YAB Dato' Sri's confirmation and implementation of the items below as advised'. PW44 understood this to mean that Nik Faisal had already previously discussed with the accused these matters verbally and then had put them into writing as in P557. As such it is not that the request was kick started by SRC without any prior discussion with the accused.

[622] That was not the end of the matter. As mentioned earlier, in order to process the change of ownership, PW44 was responsible to prepare a written proposal paper for the approval of the accused. PW44 further testified that once the draft proposal paper was completed, it had to be taken by PW44 to the air force base airport to the accused who to PW44's surprise then wrote his agreement on the draft paper itself (P532A and P532B). PW44 further testified that it was a representative of 1MDB who acted as a liaison person with the MOF who had told him (I emphasise PW44 was then a Deputy Secretary General of the Treasury no less) that the accused, the Finance Minister, wanted to see the response from MOF and it was also the same representative who told PW44 to meet the accused at the airport for that purpose.

[623] Given the accused's approval, the formalisation of the transfer of the ownership of all the shares in SRC from 1MDB to MOF Inc by way of the usual Form 32A dated 14 February 2012 was effected by the execution by 1MDB and by the accused as MOF Inc, stated to be in the presence of Nik Faisal (P382A). This thus resulted in a further consolidation of the control the accused had over SRC. Quite apart from his role as the Prime Minister with powers conferred by the M&A, previously the accused was the indirect ultimate shareholder of SRC via 1MDB, but now, as its direct shareholder. This made it possible for the accused, as the MOF Inc, the shareholder of SRC to directly issue the shareholder minutes to the board of directors of the company.

[624] Here, the accused worked from day one towards being in control of SRC, as the Prime Minister with the authority to hire and fire those who are legally accountable to run and manage the company, and without whose consent the M&A of the company cannot be amended; as the Finance Minister representing MOF Inc was the company's sole shareholder; and as the advisor emeritus to whom all strategic and important matters must be referred by the board of directors, resulted in the accused having overall control of SRC, and

by extension the assets and properties of the company, through its board of directors. Significantly the assets and properties of the SRC remained under the ownership of the company.

[625] The directors were fiduciaries and responsible to manage the affairs of the company and they were entrusted with the property of the company. Similarly, given his overarching control of the company, more so with a much greater scale and degree than the board of directors, the accused too was plainly entrusted with the assets and properties of the company, if not entrusted with dominion over such assets and properties of SRC.

[626] The accused's control over all matters SRC is all embracing. SRC is only a private limited company but it was no ordinary company. As the Finance Minister, the accused in the capacity as MOF Inc was the sole shareholder of SRC. The various shareholder resolutions of the MOF Inc were followed by and formed the basis of many of the directors' resolutions of SRC. As the Prime Minister the accused was named in the articles of the company as the only person empowered to appoint or dismiss any member of the board of directors of SRC as well the only person authorised to amend the articles of the company. Pursuant the shareholder resolution issued by MOF Inc and signed by the accused dated 23 April 2012 (P510) the direction was to incorporate the new article 117 into the M&A of SRC. Since this involved an amendment to the articles, the consent of the accused as the PM was necessary, and a letter of consent was issued by the accused as the PM under article 116 (P512). And article 117 itself is about the creation of the position of an advisor emeritus of SRC for the accused as the Prime Minister.

[627] This required the directors of SRC to seek the advice of the advisor emeritus on all material and strategic matters concerning the company. PW39 the former chairman testified that with this new position, the accused had full control over all aspects of the running of the company. PW42, another former director of the company testified that the insertion of article 117 changed the make-up of SRC because in order to operate the instruction of the accused must be received by the directors. In the corporate governance structure of SRC, the true control and ultimate power vested in the accused and no other. The law would therefore consider the accused to have been entrusted with full dominion over SRC including its property, even from its establishment.

[628] With such extensive degree of control reposed in the accused making him, as stated earlier, a shadow director or a director within the meaning ascribed to it under s 402A of the Penal Code, as well as an agent of SRC in his capacity of the Prime Minister and advisor emeritus as named in the articles, and as the Finance Minister, all similarly as defined under s 402A, the accused was thus entrusted with dominion over the properties of SRC, including the

RM42m specified in the three CBT charges. For clarity I reiterate that as held by the Court of Appeal in *Aisyah bt Mohd Rose & Anor v Public Prosecutor* [2016] 1 MLJ 840; [2016] 1 CLJ 529, it is immaterial whether the requisite entrustment is established directly or indirectly, for the accused here plainly had control over the company which must include having dominion through the directors over the company's properties and funds as well.

[629] His control and dominion over all activities of SRC was both total and complete. Such control and dominion was exercised by the accused at both the decision-making organs of a company, namely through its board of directors and as its sole shareholder. And with such control and dominion, including over the assets and properties of SRC, entrustment came into the picture by the operation of law.

[630] It is less significant to ascertain whether the entrustment related more with the property of the company or with dominion over such property given the overarching nature and degree of the control the accused wielded over all things SRC. Because the end result still witnessed him having ultimate control over the properties of the company. Nevertheless I would consider the accused having been entrusted with dominion over the property of the company would resonate better with the facts and evidence of the case, given the control being exercised in an indirect fashion — through the board of directors of SRC.

[631] The element of entrustment over the property of SRC or over dominion over such property on the part of the accused was particularly manifest, if not additionally onerous, because his control over SRC arose from his official and representative public office capacity. The articles in M&A named the Prime Minister as having the relevant requisite authority as was the Prime Minister being appointed as the advisor emeritus of the company. The accused was not personally named in the articles. Similarly his control over the shareholding of the company arose from the MOF Inc being its only shareholder and under the law, the Finance Minister is MOF Inc. Again, the accused was not specified as the shareholder by name.

[632] All these further fortify the assertion that given that the accused's overarching control of SRC (inclusive, necessarily of his dominion over the assets and properties of the company) arose from his official and public office representative capacity, the same must be exercised not only in the interest of and for the benefit of SRC as the true legal owner of the assets and properties of the company, but also for the purpose of safeguarding the interests of the government and by extension, the citizens of the nation, taking into account his role as the Prime Minister as named in the articles, as well as the Finance Minister, being the shareholder (MOF Inc) of the company.

[633] This finding is further fortified with such matters of evidence on the accused's involvement and interventions in the loan applications by SRC to KWAP, the applications for government guarantees, the transfer of the ownership of SRC from 1MDB to MOF Inc, the direction by him to the Second Finance Minister (PW56) not to interfere in SRC matters, the evidence given by PW53 (a former deputy Secretary General of MOF) and PW56 on the inability of MOF to have proper oversight over SRC despite being owned by MOF Inc, and more especially the testimonies of two former directors of SRC, PW39 and PW42 on the commanding role of the accused in SRC expressed either in the decision on directors' appointments, or in shareholder resolutions, or as represented by Nik Faisal, more than amply demonstrate that the accused was plainly in the position of one entrusted the dominion over the property and inclusive of the funds of SRC, such as the RM42m subject to the three CBT charges against the accused.

[634] There is no doubt that the element of the accused having been entrusted with the properties and funds of SRC or with dominion over such properties and funds has been successfully proven by the prosecution given the evidence made available before this court.

OTHER ASPECTS ON ENTRUSTMENT RAISED BY THE DEFENCE

Whether corporate governance regime shows overarching control by the accused given the entrustment with dominion over property

[635] The defence made much of its take on the corporate governance regime of SRC. I do not disagree with the approach taken by the defence in focussing on the corporate governance regime of SRC to ascertain parties in control, upon whom the entrustment lies. But I cannot on evidence accept its conclusion that the accused was not in a position to exercise control over *the properties* of the company, which means that he could not have been entrusted with the said property, including the RM42m. Instead, the defence argues that it was the board of directors of SRC who had been entrusted with exclusive control over SRC's properties, to the exclusion of the accused.

[636] The defence's assertions on the application of the law on entrustment under s 405 are flawed. As I have stated earlier, first, s 405 itself provides that entrustment can be made jointly, and the Court of Appeal in *Cho Sing Kho* has emphasised that entrustment need not be exclusive. It does not therefore matter that despite the accused's control over SRC, at the same time, the directors of SRC still retained their usual control in exercise of their statutory and fiduciary duties.

[637] Secondly, the Court of Appeal in *Aisyah bt Mohd Rose & Anor v Public*

Prosecutor has also held that s 405 speaks of 'in any manner entrusted' such that entrustment can also be made of property entrusted by the owner to the accused indirectly. As such it does not matter if like what had happened in this instant case, the entrustment came about not directly from the owner that is SRC but instead in a more indirect fashion through the enabling powers as contained in the constitution of SRC, as well as the shareholder of SRC, all of which were as a result of a series of official endeavours approved by the accused himself.

[638] And further, thirdly under s 405, as mentioned, there is clearly a distinction between entrustment with property and entrustment with dominion over property. The former may be typically exemplified by the person who has overall control of the operations of a company whilst the latter, one who has day to day control of merely an aspect of that operation.

[639] When applied to the instant case, the accused had the overarching control of the company through its power of hire and fire over the directors (as the Prime Minister) as the various directions involving Nik Faisal has shown, its directions to the directors through the various shareholder minutes (as the Finance Minister), and its advice on strategic and important matters which must be sought by the directors (as the advisor emeritus).

[640] In other words, the accused was entrusted with dominion over the property of the company through the directors of the company. The accused did not exercise day to day control of the affairs of the company. He never sought to do that. Because it was unnecessary when the controlling influence could be and was secured through the directors of the company who had direct control over the properties and funds of SRC.

[641] Equally crucially, the day-to-day running of the company, including all financial transactions of SRC, was conducted by Nik Faisal, its CEO (as well as a director on the board of directors of SRC) who consistently represented to the directors that he was acting on the instructions of the accused. This further shows the extent of the accused's control over all matters related to SRC and its properties, including the RM42m, as a result of being entrusted with dominion over the property of the company.

[642] As I have discussed earlier in the context of the accused's role as a shadow and s 402A director of SRC, which analysis should similarly be relevant to entrustment herein, evidence, especially the direct and personal knowledge of two of SRC's directors — PW39 and PW42, is clear in demonstrating the extent of the overarching control exercised by the accused over the company, in most cases communicated through Nik Faisal as a fellow director and CEO of SRC, who at the same time even performed the role as the mandate holder for

the accused's three personal Am-Islamic accounts.

[643] This overwhelming degree of control was exercised by virtue of his power as the Prime Minister as stated in the company's M&A, as the Finance Minister through the various shareholder resolutions issued by MOF Inc., which based on the testimony of PW39 and PW42 preceded and determined the resolutions resolved by the directors, and as the advisor emeritus of SRC as enshrined in article 117 of the M&A of the company.

[644] The corporate governance regime of SRC was at the material time quite unique, in light of the overarching powers exercisable by the accused personally at the various controlling levels. It is manifest that as a result he had the requisite entrustment with dominion over the property of SRC. Both PW39 and PW42 testified that SRC was not run like any other normal company, but instead was in the full control of the accused. The M&A gives the distinct power to the Prime Minister to appoint or remove the board of directors and the CEO of the company, whilst these directors were under the law had accountability over matters related to the business and the investments of the company.

[645] It is no exaggeration for the prosecution to submit that it was very unusual for the head of government to have been vested with such vast authority to oversee and control the affairs of a private limited company incorporated under the Companies Act 1965. There was not a material action that SRC took which was not the result of a decision by the accused, whether as part of its management (de facto or shadow director or as a s 402A director) or as a shareholder in the name of MOF Inc.

Whether the directors' lack of knowledge of SRC's two company accounts material

[646] Further even though evidence adduced at trial reveals that the directors of SRC or at least PW39 were not aware of the existence of two separate company's bank accounts with Am-Islamic Bank, the monies in both of the accounts were known to the directors and acted upon by them. After all, as stated earlier, PW39 had given evidence that the RM4 billion loan from KWAP to SRC were dealt with by the directors' resolutions in accordance with the shareholder instructions signed by the accused, and which monies are from both of these company accounts.

[647] In fact the existence of the second account which was not disclosed by Nik Faisal shows the extent of the CEO's involvement in the day to day running of the company. And this is the same person whom the directors stated was the link to the Prime Minister including especially the shareholder

resolutions and also the person who helped to manage the to personal bank accounts of the accused as the mandate holder.

[648] The argument of the defence that the accused did not have any power or control over the funds of SRC because banking instructions were executed by the relevant financial institutions through the directors' resolutions of the company does not hold water. This is given the evidence especially that of PW39 that the directors' circular resolutions concerning the funds of SRC had been issued to give effect to and based on the shareholder minutes issued by the accused in the first place. After all, it is generally a known commercial and banking practice that financial institutions would only act on the resolutions issue by the directors of a company. This is precisely because of the well-established rule in company law that the management of a company is the responsibility of its directors.

In addition, more importantly it will be shown by evidence that the accused had caused others on the board of directors to effect the transfers of fund of SRC.

Whether board minutes and DCR not referring to instructions from accused relevant

[649] Thus even though the minutes of SRC board of directors' meetings and directors' circular resolutions do not specifically reveal the instructions of the accused in relation to the financial transactions of SRC, it has been shown that the directors were aware of their own fiduciary duties, and at the same time acutely conscious that the shareholder minutes came from the Finance Minister who was also the Prime Minister and the same person who had appointed the directors to the board of the company.

[650] They knew the company's CEO Nik Faisal was their link with the Prime Minister, Finance Minister and advisor emeritus of the company, on the basis of representations made by Nik Faisal to them himself, bolstered by his showing the shareholder minutes signed by the accused to them. They thus had no reason to disbelieve Nik Faisal and understood that every mention of the 'Government' vis a vis SRC as articulated by Nik Faisal was a reference to the accused.

[651] In any event, Nik Faisal had also attended a high-level discussion with the accused in relation to the operations of SRC as evidenced in the minutes of that meeting ID499 (disputed by the defence) which was crucially also recorded by the board in its meeting minutes in P498. And as I have discussed earlier, PW39 and PW42 too testified that they believed there was nothing

wrong with the instructions received from the shareholder minutes as the directors believed they were all in the best interests of the company.

[652] For the same reason there was no basis to verify with or escalate the decisions the directors made to the accused himself because they were fully aware they were following his instructions in the first place. It could also be negatively construed, as if the directors had doubts over the written instructions of the person who had appointed them. PW39 also confirmed his familiarity with the signature of the accused, given his previous and other official dealings with the accused including during his stint as the CEO of the Pilgrims Board. Reference to the accused in his capacity as the advisor emeritus was also unnecessary because that would be required for matters of strategic and national interests.

Whether representative capacity means there is no entrustment

[653] It is also erroneous to say that because SRC was an MOF Inc/MKD-owned company, the position of the accused as the 'corporate representative' of MKD or MOF Inc does not create entrustment of the properties of SRC to the accused. This is because the directors acted on the shareholder minutes issued by the accused albeit in his capacity as the MOF Inc. Evidence shows the involvement of no one else in the process at MKD despite SRC being wholly owned by MOF Inc.

[654] These were the instructions of the accused resolved at the paper general meeting of SRC, and the deemed meeting passed the resolution of a single person who was the accused in his capacity as the corporate representative of MOF Inc under the process set out under s 147(6) of the Companies Act 1965.

[655] As I have stated earlier, under s 3 of the Minister of Finance (Incorporation) Act 1957, the Minister of Finance (Incorporated) is the Finance Minister. It is not correct thus to say that the accused, as the Finance Minister is the corporate representative of MOF Inc. The accused, as the Finance Minister, was the MOF Inc.

[656] The corporate representative capacity was relevant only when the accused signed as the shareholder of SRC for the purposes of constituting a general meeting of a company with a sole corporate shareholder under s 147(6) of the Companies Act 1965. And since the shareholder like MOF Inc is a corporate entity, the provision requires a representative (meaning a natural person) of the corporate shareholder to sign the relevant resolutions which became the shareholder minutes.

[657] So at the risk of repetition, even though the accused signed as a corporate representative of MOF Inc, that was in the context of the procedure for a general meeting, and effected to ensure compliance with the meeting process stipulated under the Companies Act 1965. It does not detract from the legal position that the Finance Minister is the MOF Inc. At the material time, it was the accused. This is unique and quite unlike other situations involving corporate representatives of companies to sign similar resolutions (or shareholder minutes) of the general meetings of their subsidiaries. There, commonly the corporate representative would be a director or senior executive of the holding company or shareholder. But for MOF Inc the statute says that the Finance Minister is MOF Inc.

[658] Any apparent inconsistency in the various shareholder minutes is immaterial for the directors did give effect to the substance of the specific decisions of the shareholder contained therein. PW39 also testified that these shareholder minutes were consistent with P530 that had been previously shown to PW39.

Whether P530 and P497, being photocopied versions (with one page original), are authentic

[659] The defence questioned the veracity of two documents — shareholder minutes in P530 and P497 received from 1MDB as the holding company of SRC earlier. Like SRC, shareholder minutes of 1MDB also bear the signatures of the accused, for MOF Inc was the sole shareholder of 1MDB. The defence submitted that these documents were dubious and no verification was sought to prove its authenticity.

[660] The prosecution contends that these documents are authentic and were signed by the accused. The prosecution asserts that learned defence counsel merely ascertained the authenticity of a document simply by referring to the back of every page of a document and then putting to witnesses that they were authentic or otherwise.

[661] PW39 himself disagreed when cross-examined that these two documents had been 'engineered'. And, as highlighted by the prosecution, during the cross-examination of PW39, learned counsel put to the witness that P530 contained the original signature of the accused (on page three) but that the remaining pages with the accused's signatures were photocopies. The following excerpt is relevant (notes of proceedings on 17 June 2019 — PW39):

S: You remember. I asked Tan Sri a number of times your impression when you joined SRC was a clean slate company?

J: Was in?

S: Clean slate company. You don't have much briefing. Substantial briefing was first BOD meeting, 23rd August. Right? Okay. Now, I am going to say this Tan Sri. *This document in front of you is an engineered document. My client never signed this type of minute in this fashion* and he never instructed Amhari to send this document. Correct. It is engineered. And I even show you why it is engineered. Look at the sets of signatures. *There is only 1 signature that is not a photocopy. And that is at IDD530 (3). Page 3 of that document.*

SPP: The question. What is your question and answer? Not asking the question.

Counsel: I am asking the question.

DPP: I don't understand your question myself.

Counsel: Okay okay I will take it. My position it is an engineered document. My question, apart from the signature at third page?

DPP: Engineered, he might not understand.

Counsel: He knows, that is not for him not to know.

DPP: No, if you said engineered he may not understand. Use a normal terminology.

S: That is not my question. That is for me to put on record. *Apart from the signature at page 3, the rest of the signatures at page 5, page 6, page 7, page 8, page 9, are all photocopies. Have a look at it. Yup?*

J: *Based on this document, yes.* (Emphasis added.)

[662] From the above, it appears that the defence is contending that P530 and P497 were 'engineered' and never signed by the accused. At the same time however, the defence is also stating that p 3 of P530 (the first set of shareholder minutes of 1MDB) is an original signature of the accused. During trial the defence never suggested the signatures in P530 were forged. Its stance was the signature of the accused on p 3 of P530 is genuine but the other pages with his signatures are photocopied versions.

Whether shareholder minutes not binding but followed due to dominion of the accused

[663] It is true that the shareholder minutes are not binding on the directors because of the division of powers between the directors and the shareholders under company law. And management-matters are under the purview of company directors. I have discussed this earlier. Suffice that I reiterate that in this instant case, evidence, especially from PW39 and PW42 has shown that every shareholder instruction from the accused, despite being decisions on management matters, was expected to be carried out by the directors, given his position of controlling authority and power in SRC.

[664] The re-examination of PW39 bears out clearly the fact that the decisions or instructions of the accused documented in shareholder minutes from 1MDB in P530 and in the meeting minutes (between the accused and Nik Faisal) in ID499 were at least in matters of substance followed through by the board of directors. This is unmistakably recorded in the minutes of the meetings of the board of directors of SRC in P495 and P498. The notes of proceedings on 18 June 2019 — PW39) discloses this:

J:	Substance over form if you ask me.
S:	Yes, substance over form. Okay. Because the 3 ... His main thing is if you say you acted of the resolution of the Prime Minister or Finance Minister, why isn't it exactly reflected?
J:	But substances are there.
S:	Yes okay. So if resolutions or minutes come from the Prime Minister, do you all still deliberate before implementing it?
J:	We did, we have to ensure that you know, it has to be executed accordingly properly.
S:	Properly, okay. Did you all then ...
J:	Because at the end of the day, we still have to safeguard the interest of the company.
S:	Of course, of course, of course. Is there occasions where you decided to defy the minutes or resolutions coming from Dato' Sri Najib in whatever capacity? Defy?
J:	I can't recall any, yes.

Whether deficiency in reporting mechanism the fault of the accused

[665] The defence also advances the interesting argument that the accused had no entrustment of SRC's properties because any deficiency in the reporting mechanism from SRC to MKD Division ('BMKD') in MOF in accordance with MKD guidelines applicable to all MOF Inc entities ought to be attributed to the BMKD Division, and not the accused personally.

[666] But the preponderance of evidence as set out earlier strongly shows that such shortcoming, if that was indeed the case, was attributed to Nik Faisal and the accused. SRC through the actions of Nik Faisal, could brush aside or ignore procedures in place at BMKD simply by representing that SRC had the support of the accused. The application process for the government guarantees which involved MOF officials dealing with Nik Faisal, and their subsequent dealings with SRC, as discussed earlier, demonstrates this point clearly. The testimonies of witnesses from MOF all make the complete and overriding narrative of the difficulty of getting cooperation from SRC.

[667] These include the requisite documentation often not forthcoming (as testified by PW41, PW43, PW53 and PW56), the pressure on MOF to expedite even to the extent of not completing its usual diligence and verification process (PW41, PW43, PW45), the process to transfer ownership of SRC directly under the accused as MOF Inc. (PW44) as well as being directly contacted by the accused personally (PW45), and refused approval by the accused to pursue status of the funds of SRC overseas (PW56).

[668] It bears emphasis that PW41 remarked in court that SRC was 'syarikat PM', and PW44 plainly articulated that the transfer of the ownership of the entire shares in SRC from 1MDB to MOF Inc was a 'top-down' decision-making process because the accused had already given his approval when PW44 was tasked to see it through.

Whether the RM42m belonged to SRC

[669] Specifically on the property of the RM42m which belonged to SRC, the defence submitted that the prosecution must establish that the entrustment was for dominion over the funds amounting to RM42m which was alleged to have been misappropriated by the accused. The accused can only misappropriate what he is entrusted with, and the defence referred to several authorities to support its submission.

[670] I have already dealt with the evidence on the entrustment on the part of the accused with the dominion over the properties of SRC. These included the RM42m. There can be no denying that the RM42m belonged to SRC. The money trail, as will be elaborated on later, clearly records that the said RM42m originated from SRC's Am-Islamic Bank account and transited through the bank accounts of GMSB and IPSB before it was deposited into two of the accused's personal bank accounts.

[671] These transfers are more than abundantly confirmed in the bank statements of the accused's personal bank accounts (P270 for Account 880 and P110 for Account 906) which registered the crediting of the RM42m in these accounts, from IPSB's account. I repeat that PW21, the bank manager at AmBank JRC branch and PW54, the relationship manager in charge of the accused's personal accounts confirmed that there was no report or complaint from the accused to the bank, nor was there any legal action taken by him in relation to the RM42m being deposited into his accounts.

[672] Further, the movement of the RM42m from SRC through GMSB and IPSB does not detract from the fact that it was SRC funds that were being diverted into the accused's personal accounts. The defence's contention that because the SRC funds had passed through GMSB to IPSB, SRC had divested

itself of these funds in the sense that the RM42m that arrived into the accused's personal accounts could not therefore be considered as the funds of SRC is absolutely specious and untenable. After all there is no reason for SRC to transfer its funds to GMSB in as much as there is no reason for GMSB to transfer 'its' funds to IPSB. None was offered.

[673] It is inescapable that these transfers were carried out in that fashion in order to avoid detection. This is further supported by the transfers being made on the same day for no apparent reason. And PW37 of IPSB testified that the funds did not belong to IPSB, but that IPSB was instead used as a conduit for the transfer of the funds to the accused's undisclosed accounts, which subsequently were discovered to belong to the accused. That PW37 was not apprised of the identity of the account holder is further indication that the purpose of the transfer was to avoid detection by SRC, GMSB, IPSB and the authorities.

[674] The accused was thus plainly entrusted with the properties of SRC, including all monies standing to the credit of SRC and the RM42m. Given his position of overarching control in SRC — particularly his position as a director under s 402A of the Penal Code and as a shadow director, the accused was entrusted with dominion over the properties, via the board of directors of the company.

[675] There is also an argument by the defence that the RM42m could not have been from SRC because all of its funds had been disbursed in 2011 and 2012. This is not supported by evidence. Above all it is a spurious contention. For it is trite, as submitted by the prosecution, that all funds standing to the credit of SRC at any period of time and from whatever source are the property of SRC. Any funds debited out of SRC, being a loss to the company, goes towards completing the commission of the offence of CBT under s 409, not to mention the subsequent deposit of the funds into the accounts of the accused, which additionally would be a wrongful gain on the part of the accused.

Whether directors' absence of knowledge of misappropriation negates entrustment

[676] It is irrelevant that PW39 and PW42 had no knowledge that the accused had misappropriated SRC's RM42m. That is not an ingredient of the offence of s 409 of the Penal Code. What needs to be proved, which has been established, as discussed earlier is that the accused was entrusted with dominion over the properties of the company. The dominion was through its overarching controlling position in the company, as acknowledged by its directors.

[677] Because of this all-pervasive control, as will be discussed further, Dato Suboh Yassin ('PW42') and Nik Faisal authorised the transfers of the funds out of SRC into GMSB, and then from GMSB to IPSB. PW42 testified he merely executed the transfer instructions as requested by Nik Faisal, the CEO and the link person between the directors and the accused. Evidence also shows Ung Su Ling (PW49), the CEO of YR1M told the MD of IPSB, Dato' Dr Shamsul Anwar Sulaiman (PW37) that she was instructed by the late principal private secretary of the accused, Datuk Azlin, to get IPSB effect the subsequent transfers of the RM42m from IPSB into the two accounts which turned out to be those owned by the accused.

[678] I highlight again that the late Datuk Azlin who worked at the PMO as the accused's principal private secretary then also sat on the board of trustees of YR1M, with the accused being the chairman. For the record, at the time of the transfers which are now subject to the criminal charges against the accused, in late 2014 and early 2015, Tan Sri Ismee (PW39) had already resigned and left the board of SRC.

[679] Indeed, the absence of knowledge on the part of the directors is consistent with the finding that it was the accused who had overarching control in SRC, and had the entrustment with dominion of the properties of SRC.

THIRD INGREDIENT OF CBT — WHETHER THE ACCUSED COMMITTED MISAPPROPRIATION

The law

[680] The third key element of the CBT charges is whether the accused being entrusted with dominion over the property of SRC, had committed criminal breach of trust in respect of the total sum of RM42m specified in the three charges. Under the law, CBT may be committed in five different ways, which includes misappropriation. And for each of the five, a necessary element that must additionally be shown is dishonesty.

[681] These are first, that the accused dishonestly misappropriates the property; secondly he dishonestly converts it to his own use; thirdly, he dishonestly uses or disposes of the property in violation of any direction of law prescribing the manner in which such trust is to be discharged; fourthly he dishonestly uses or disposes of the property in violation of any legal contract made touching the discharge of such trust; and fifthly he wilfully suffers any other person so to do either one of the aforesaid third or fourth mode of committing CBT.

[682] The prosecution alleges that the accused committed, in respect of the three CBT charges, the first four modes as just mentioned. The prosecution is not interested to pursue any accusation that the accused had caused or wilfully suffered others to commit CBT.

[683] It should also be mentioned that as is the case with almost all criminal offences it is a cardinal principle of the law that the prosecution must also establish the mental element of the accused in the commission of the offence. In the case of CBT, s 405 specifies the element of 'dishonesty' in respect of the first, second, third and fourth modes of the offence, and 'wilful suffering' for the fifth.

Evidence of misappropriation

[684] There is no ambiguity in what misappropriation means. It has been held that to misappropriate means to set aside or assign to the wrong person or wrong use (*Tan Tze Chye v Public Prosecutor* [1997] 2 SLR 505; [1997] 1 SLR (R) 876).

[685] I now analyse the evidence adduced during the prosecution stage in the context of the three CBT charges. It bears emphasis that there are three separate CBT charges. They concern different amount, and different dates and different bank accounts of the accused. The accused is charged with CBT in respect of first, the amount ofRM27m effected on 26 December 2014 which was deposited in his Account 880; secondly the amount of RM5m, on 26 December 2014 into his Account 906; and thirdly, the amount of RM10m, on 10 February 2015 into his Account 880.

[686] In the first place, I should state that in all three charges, the flow of funds which allegedly finally rested in the accounts of the accused did not get credited directly from the account of SRC. There were two intermediary companies, GMSB and IPSB, as mentioned previously. On all occasions, it is alleged that the funds of SRC; the RM27m, the RM5m and the RM10m were first transferred from SRC to GMSB, and then from GMSB to IPSB before they got deposited from IPSB into the two personal accounts of the accused.

The first CBT charge — Sum of RM27m and the second CBT charge — sum of RM5m

The flow of funds — The money trail

[687] The money trail for the first and second CBT charges is said to be the same, save for the final leg where the RM27m in the first charge went into one account of the accused, and the RM5m in relation to the second charge flowed into another account of the accused.

SRC to GMSB

[688] The starting point was that the source of the RM27m and the RM5m was a single and same debit item of RM40m belonging to SRC from SRC's Am-Islamic Bank account No 2112022010650 (P62) to GMSB's Am-Islamic Bank account No 888100380694 (P64). This was documented in an instruction letter from SRC dated 24 December 2014 (P258) signed by both Nik Faisal and Datuk Suboh (PW42) (the two authorised signatories), addressed to Am-Islamic Bank to instruct the transfer of the RM40m to the said account of GMSB. Emails between officers of AmBank with that of SRC and between AmBank private banking team and its JRC Branch (P259 and P260) also confirm this communication.

[689] Evidence of the transfer having been performed by Am-Islamic Bank may be seen in the so-called the thermal receipt issued by the bank dated 24 December 2014 (P261), SRC's own statement of account (P256) which recorded the words 'DEBIT TRANSFER' of RM40m on the transaction date of 24 December 2014, and the statement of account of GMSB (P266) which recorded 'CREDIT TRANSFER, SRC INTERNATIONAL SB, as per attached' also for the same sum of RM40m on the same date of 24 December 2014. At this stage, the RM40m had left SRC and was now in the account of GMSB.

GMSB to IPSB

[690] The same RM40m was then transferred to the bank account of IPSB — account No 106810001108 maintained at Affin Bank. The instruction for the transfer from GMSB to IPSB may be found in a letter from GMSB, also dated 24 December 2014 (P267), also signed by Nik Faisal and PW42 and addressed to Am-Islamic Bank authorizing the latter to effect the transfer of the RM40m to the said account of IPSB at Affin Bank.

[691] The instruction for the transfer of the RM40m from GMSB to IPSB was duly executed. No better evidence can confirm this other than documents produced and witnesses from the transacting banks themselves. Wedani bt Senen (PW24), the manager at AmBank Bank Remittance Centre testified that GMSB's instruction letter dated 24 December 2014 had been processed and the RM40m was transferred to IPSB's account at Affin Bank via the RENTAS mechanism.

[692] The documentary evidence which substantiated this execution included the single credit completion advise dated 24 December 2014 (P322) on the RM40m; the thermal receipt dated 24 December 2014 (P323) for the withdrawal of RM40m from GMSB's account; and the statement of account of GMSB (P266) which included the entry 'CASA/TD BGL TRF/DEBIT TRANSFER ...' for the sum of RM40m on 24 December 2014.

[693] For the receiving bank, Rosaiah bt Mohamed Rosli (PW20) a processing officer at Affin Bank (Headquarters) and Norhayati bt Mohd Yunus (PW30), the Affin Bank branch manager at The Curve gave evidence that IPSB's account No 106810001108 (P77) did receive the sum of RM40m via RENTAS from GMSB's Am-Islamic Bank account, with confirmatory documents included the single credit confirmation advice dated 24 December 2014 (P71) on the RM40m; the statement of account of IPSB (P250) which included the item of 'CREDIT TRANSFER' of the RM40m on that same date of 24 December 2014. The RM40m which originated from SRC was by now firmly with IPSB.

IPSB to the accounts of the accused — Two remittances, one each for the first and second CBT charges

[694] Money trail further shows the transfer, this time from IPSB, which finally ended into the accounts of the accused. The said PW30 of Affin Bank stated that two remittance forms, both dated 26 December 2014 one of which for the RM27m (P402) and the other for RM5m (P403) issued by IPSB were successfully processed and the said funds were received by Am-Islamic Bank. The two remittance forms had specified the two different accounts to receive the RM27m and the RM5m, namely Account 880 and Account 906, respectively, at Am-Islamic Bank. IPSB's statement of account (P250) also confirmed this and stated a 'DEBIT TRANSFER' of both the RM27m and the RM5m on 26 December 2014.

[695] The receipt into the two accounts of the accused at Am-Islamic Bank was confirmed in the testimony of Uma Devi Raghavan (PW21) the manager at the Am-Bank JRC branch where the accounts of the accused were maintained, as specified in the charges, and by Wedani bt Senen (PW24), the said manager at AmBank Bank Remittance Centre.

[696] Through them, to substantiate its case, the prosecution also tendered the statement of account for the accused's Account 880 (P270) which recorded 'CREDIT TRANSER, IHSAN PERDANA SDN BH, CSR PROGRAMS', for the sum of RM27m, the single credit confirmation advice dated 26 December 2014 (P73A) for receiving the sum of RM27m, and the thermal

receipt dated 26 December 2014 (P337) for the depositing of RM27m into Account 880. That was in respect of the RM27m subject to the first CBT charge.

[697] As for the second CBT charge, the statement for this Account 906 (P110) which recorded 'CREDIT TRANSFER, IHSAN PERDANA SDN BH, CSR PROGRAMS' for the sum of RM5m, was tendered, as were the confirmatory single credit confirmation advice dated 26 December 2014 (P74A) for receiving the sum of RM5m, and the thermal receipt dated 26 December 2014 (P340) for depositing the RM5m into the Account 906.

[698] Now, unlike in SRC and GMSB, Nik Faisal and PW42 were not directors of IPSB. There is no evidence that IPSB ever had any direct dealings with SRC or GMSB. What led IPSB to send the funds to the accounts of the accused?

[699] IPSB was a company ran by Dato' Dr Shamsul Anwar bin Sulaiman (PW37) who was its managing director. The company was set up by 1MDB to carry out corporate social responsibility (CSR) programs for 1MDB. According to PW37, just before the crediting of the RM40m into the account of IPSB, he was informed by Dennis See, the project manager of Yayasan Rakyat 1Malaysia ('YR1M') at the former's office, that IPSB's account was to be utilised as a transit account to transfer a certain sum of money.

[700] Dennis See did not however disclose anything else about the plan to transfer. Not on the sum, the date, the recipient or why the account of IPSB had been identified or the reason for the use of its account for transit purposes in the first place. The conversation between PW37 and Dennis See was a few days before the actual transfer.

[701] As mentioned earlier, the RM40m was credited into the account of IPSB on 24 December 2014. PW37 testified that on that same day, he also received an email (P480) from Ung Su Ling (PW49), the CEO of YR1M who asked that PW37 authorise transfers of funds from IPSB's account to two undisclosed coded accounts at Am-Islamic Bank. This was the instruction to credit the RM27m and the RM5m into two different accounts of the accused, from the RM40m transferred to IPSB's account. The relevant extracts of the instructions from PW49's email are as follows:

> Account Name: AmPrivate Banking — 1MY
>
> Account No: 211 202 201 1880
>
> Amount: RM27 million
>
> Bank Name: AmIslamic Bank Berhad (AISLMYKL)

Bank Address: Ground Floor, Bangunan AmBank Group, 55, Jalan Raja Chulan, 50200 Kuala Lumpur.

Account Name: AmPrivate Banking — MY

Account No: 211 202 201 1906

Amount: RM5 million

Bank Name: AmIslamic Bank Berhad (AISLMYKL)

Bank Address: Ground Floor, Bangunan AmBank Group, 55, Jalan Raja Chulan, 50200 Kuala Lumpur

[702] Notwithstanding the lack of meaningful details, and despite the size of the sum involved, PW37 decided to carry out the instructions of PW49. He explained in court that he was somewhat beholden to PW49 because she was the CEO of YR1M, the main funder of IPSB. PW37 also assumed that the said transfers were for CSR purposes because, according to PW37, instructions from PW49, who ran the YR1M foundation, to IPSB usually concerned CSR activities.

[703] Regardless, upon PW37 receiving the said email from PW49, PW37 did instruct the account executive at IPSB, Aishah Ghazali (PW36) to find out the identities of the owner of the intended two transferee accounts. This was not successful. This is unsurprising since the name of the account holders for the two were instead clearly system registered as *AmPrivate Banking-1MY* for Account 880 and *AmPrivate Banking — MY* for Account 906.PW36 confirmed filling up remittance forms dated 26 December 2014 for the sum of RM27m (P402) and the sum of RM5m (P403) into the two specific accounts as stated in the email from the CEO of YR1M (PW49). PW36 then submitted the signed forms to Affin Bank on 26 December 2014 and both transfers were effected the same day.

[704] PW37 further claimed in his testimony that he had sought clarification from PW49 and Dennis See as to the source of the funds, the purpose of the transfer and the owner of both the accounts. However, the two continued not to reveal such the information to PW37. Dennis See claimed, according to PW37, he was merely following instructions.

[705] PW49, on the other hand, when testifying, said that she had acted on the instructions of the late Datuk Azlin Alias (the principal private secretary to the Prime Minister, the accused) to cause the transfer of RM27m and RM5m respectively from IPSB to Accounts 880 and 906 (at that point the identity of the owner was also unknown to her). PW49 communicated those instructions to PW37 through email (P480) and WhatsApp. PW49 confirmed that the

money she had instructed PW37 to transfer was not from YR1M. However, she was informed by the late Datuk Azlin that the money that was to be transferred into the undisclosed accounts were for CSR purposes.

The third CBT charge — Sum of RM10m

The flow of funds — The money trail

[706] The flow of funds relevant to the third charge is similar to the first two. It started from SRC, then got transferred to GMSB, then IPSB, and finally deposited into the personal account of the accused.

SRC to GMSB

[707] The first two charges concerned events which took place towards the end of 2014, in the month of December. Specifically between 24 December 2014 and 29 December 2014. The third CBT charge related to events which started early February, the year after. Specifically between 10 February 2015 and 2 March 2015. The prosecution tendered two instruction letters issued by SRC dated 5 February 2015 (P262A) and 6 February 2015 (P264A), both of which were like the earlier ones in respect of the two other CBT charges, signed by both Nik Faisal and Datuk Suboh (PW42). Like before, these were also sent to Am-Islamic Bank. The purpose of the two instruction letters was similarly to authorise the transfer of funds of SRC, from its account, to the account of GMSB but this time in two tranches of RM5m.

[708] The two instructions were duly executed by Am-Islamic Bank, as evidenced by the thermal receipt dated 5 February 2015 (P263) for the debit of the sum of RM5m from SRC's account, the thermal receipt dated 6 February 2015 (P265) for the debit of the other sum of RM5m from the same SRC's account.

[709] Further, the statement of account of SRC (P256) recorded a 'DEBIT TRANSFER' of RM5m on the 5 February 2015, as well as a 'DEBIT TRANSFER' of another RM5m on 6 February 2015; and correspondingly the transferee GMSB's statement of account (P266) contained the entry 'CREDIT TRANSFER, SRC INTERNATIONAL SD, AS PER ATTACHED' for the sum of RM5m on 5 February 2015, as well as 'CREDIT TRANSFER, SRC INTERNATIONAL SD, inter acc' for the other RM5m on 6 February 2015. The transfer of RM10m into the account of GMSB was thus complete.

GMSB to IPSB

[710] From GMSB, two instruction letters dated the same as per the letters from SRC to Am-Islamic Bank, 5 February 2015 (P268) and 6 February 2015 (P269A), respectively, signed again by both Nik Faisal and PW42 (this time as directors and signatories for GMSB) were sent to Am-Islamic Bank to authorise the transfer of the said RM5m each to the same account of IPSB — account No 106810001108 maintained at Affin Bank. These were duly executed.

[711] At Am-Islamic Bank, Wedani bt Senen (PW24), the manager at Am-Islamic Bank Remittance Centre testified that the two instruction letters from GMSB had been duly processed, and the transfers was successfully effected via RENTAS by Am-Islamic Bank.

[712] This is further confirmed by the following usual bank-issued documents, namely, in respect of the transfer on 5 February 2015, the single credit completion advice dated 5 February 2015 (P327) for transferring RM5m, and the thermal receipt dated 5 February 2015 (P328) for the withdrawal of RM5m from GMSB's account. For the transfer of the other RM5m on 6 February 2015, the single credit completion advice dated 6 February 2015 (P329) for transferring the RM5m, and the thermal receipt dated 6 February 2015 (P330) for the withdrawal of RM5m from GMSB's account. On top of that, the statement of account of GMSB (P266) recorded an entry of 'CASA/TDL BGL TRF/DEBIT TRANSFER' for the amount of RM5m on 5 February 2015, and 'CASA/TDL BGL TRF/DEBIT TRANSFER' for the other RM5m, on 6 February 2015.

[713] For the receiving bank, Rosaiah bt Mohamed Rosli (PW20), the processing officer at Affin Bank and Norhayati bt Mohd Yunus (PW30) gave evidence that the IPSB's account received two credit transfer of RM5m via RENTAS on 5 February 2015 and 6 February 2015 respectively, from GMSB's Am-Islamic Bank account.

[714] And again, this is substantiated by the single credit confirmation advice dated 5 February 2015 (P248) for receiving RM5m, and the single credit confirmation advice dated 6 February 2015 (P249) for receiving RM5m. Moreover, IPSB's statement of account (P250) contained the item 'CREDIT TRANSFER N/A GANDINGAN MENTARI SDN BHD' for the sum of RM5m on 5 February 2015 and 'CREDIT TRANSFER N/A GANDINGAN MENTARI SDN BHD' for the sum of RM5m on 6 February 2015. The transfer of RM10m (RM5m each in two tranches on 5 and 6 February 2015) into the account of IPSB from GMSB was thus complete.

IPSB to the account of the accused

[715] IPSB then issued a remittance form dated 10 February 2015 for the transfer of the RM10m from IPSB account to Account 880 (belonging to the accused). At Affin Bank, Norhayati bt Mohd Yunus (PW30) confirmed in court that the remittance form dated 10 February 2015 (P404) for the transfer of RM10m to the Account 880 had been successfully processed and the said RM10m was received by Am-Islamic Bank.

[716] This transfer into the account of the accused was confirmed by Uma Devi Raghavan (PW21) the AmBank JRC branch manager and Wedani bt Senen (PW24), and this testimony is supported by the usual documentation which included the single credit confirmation advice dated 10 February 2015 (P338/P338A) for receiving the sum of RM10m, and the thermal receipt dated 10 February 2015 (P339) for the deposit of RM10m into the Account 880.

[717] In addition, the statement of account of IPSB (P250) showed a 'DEBIT TRANSFER' of RM10m on 10 February 2015, whilst correspondingly, the statement of account for the accused's Account 880 (P270) recorded an item on 'CREDIT TRANSER, IHSAN PERDANA SDN BH, AIBBMYKL' for the sum of RM10m on 10 February 2015.

[718] Some background to the crucial transfer of the RM10m into the accused's Account 880 is given by IPSB's managing director, PW37. He gave evidence that he had received a telephone call in early February 2015 from Ung Su Ling, the CEO of YR1M (PW49) who had asked that PW37 authorise the transfer of the RM10m which then resided in IPSB's account into the Account 880. He testified that he had asked PW49 about the purpose of the transfer but did not get any explanation from PW49.

[719] PW37 then instructed the same staff who had assisted in the earlier transfers, Aishah Ghazali (PW36) to do the necessary. PW36 initially did not get to submit a duly completed remittance form to Affin Bank on time on 9 February 2015. PW36 sent an email to PW49 to explain the delay on 9 February 2015 (P481). This email significantly was also forwarded to Joanna Yu (PW54), the Relationship Manager at Am-Investment Bank who was in charge of the three accounts of the accused in the private banking department. PW36 then filled up a remittance form dated 10 February 2015 (P404) for the transfer of RM10m to the Account 880 which was duly processed and executed as mentioned earlier.

[720] Interestingly, like before in respect of the two earlier transfers of RM27m and RM5m, PW37 decided to follow the instructions in relation to this RM10m without knowing, so he claimed, the purpose and reasons for the same, or even to whom the funds would be sent. It is not so different in the case of PW49, who testified that she gave the instructions to PW37 because she had

been told to do so by Datuk Azlin, the late principal private secretary to the accused, to transfer funds from IPSB's account into two accounts without satisfying themselves the reason for the transfer and the identity of the intended recipient. It should be pointed out that the late Datuk Azlin was a member of the board of trustees of YR1M, of which the accused was chairman. PW49, I repeat, was the CEO of YR1M.

[721] The evidence has therefore clearly established that the funds of SRC, specifically in the amounts of RM27m, RM5m and RM10m — in total RM42m — had been taken from an aggregate sum of RM50m transferred out of the bank account of SRC and deposited into two personal accounts of the accused, namely Accounts 880 and 906, after having been made to flow initially through GMSB and then IPSB. That the total amount of RM42m which belonged to SRC had got transferred into these two accounts of the accused is thus incontrovertible.

Evidence of misappropriation by the accused

[722] The question therefore is whether the accused effected the misappropriation? There is no direct or specific evidence that the accused gave any instructions for any of the transfers. However, the inference against him is irresistible. First, the RM42m ended up in his accounts. There is no evidence that any part of the sum transferred out of SRC, especially the RM42m that was credited into his accounts got instead diverted into the accounts of either PW42, Nik Faisal, Dennis See, PW37, PW49 or that of his late principal private secretary. Or even Jho Low.

[723] Secondly, evidence will also show that the accused subsequently spent on the said funds, for various purposes. Thirdly, the involvement in the transactions of the RM42m, of those closely associated with the accused, namely Nik Faisal and Datuk Azlin, even to the extent that he had delegated the supervision of his own personal accounts to them, is manifest. Further, whilst PW42 said he was merely following Nik Faisal's requests on signing the various instructions on behalf of SRC and GMSB, he also testified that Nik Faisal, who was initially the CEO of SRC, was the link person between the board of directors of SRC and the accused (as primarily its sole shareholder MOF Inc). PW42 even said that Nik Faisal had the accused behind him, or how he described as 'he had a mountain behind him'. Even though Nik Faisal was removed as the CEO on 11 August 2014 following complaints by PW39, he remained as a director on the board of SRC and crucially also continued to be an authorised signatory for the bank accounts of the company (and as the mandate holder for the accused's personal accounts).

[724] And that with the insertion of article 117 into the M&A of the company, PW42 testified that the board of directors 'were reduced to nothing'. PW42 and PW39, the former chairman of SRC were clear in their testimonies that as directors they had followed the directions of the accused as expressed in the various shareholder minutes issued by him as MOF Inc.

[725] Fourthly, the connection between Nik Faisal's instructions and the accused is especially compelling since the former was also the mandate holder for the personal bank accounts of the accused maintained at Am-Islamic bank, with the authority to effect transfers of funds amongst the accounts. Even though Nik Faisal did not appear on record to be involved in the transfers of the sums totaling RM42m in so far as the transaction between IPSB and the accused's Account 880 and 906 was concerned, he was personally very much involved in the many and various transfers of funds amongst and transactions involving the three personal accounts of the accused given his capacity as the mandate holder for these accounts as duly appointed by the accused.

[726] All instructions given by Nik Faisal as the mandate holder for the accused in this respect are therefore deemed in law and fact to be the instructions of the accused. An accused cannot conveniently plead ignorance of the transactions that had taken place in his accounts if effected by his own appointed nominee or mandate holder in order to avoid criminal liability. Otherwise many corporate crimes could be perpetrated with impunity by one who deliberately appoints another to manage one's account and then permits and feigns absence of knowledge of the misdemeanor occasioned by the other vis a vis that account. A customer of financial institution must under the law have knowledge of the banking activities carried out in his account. The responsibility for the activities in the personal accounts of the holder is firmly with the holder.

[727] This was recently reaffirmed by the Court of Appeal in the case of *Yap Khay Cheong Sdn Bhd v Susan George a/p TM George* [2019] 1 MLJ 410 where Her Ladyship Rohana Yusuff JCA (now President of the Court of Appeal) made this important observation:

> The defendant as an account holder, has sole legal control and custody of her own bank account. It is accepted that no person can have any access to another person's account unless consented to. In this case the defendant had allowed Tharvinder free access to her account and she should be held responsible for the outcome of her action. Since she had allowed Tharvinder to meddle with her account, in our view she cannot absolve her responsibility by just feigning ignorance about what went on in her account.

[728] Similarly in the instant case, the accused is accountable for the activities and transactions carried out in his personal accounts, even if they were

performed by Nik Faisal, more so since he was the accused's own duly appointed mandate holder for the three personal accounts of the accused. This is not taking into account the inference of knowledge and dishonest intention of the accused of the misappropriation that may be raised based on the evidence.

[729] Fifthly, for the transactions involving the transfers of funds from SRC to GMSB and from the latter to IPSB, the defence highlighted that various instruction letters issued to the bank and which bear the signatures of Nik Faisal and PW42 are not original documents but instead merely scanned versions of the same. In addition, the signatures on these instructions appear to be in the nature of being 'cut and paste'. PW42 himself agreed when cross-examined and shown the identical signatures of his on all the said instruction letters that he did not sign those instructions. It is also apparent that the signatures of Nik Faisal on those instructions too seem to have been placed thereon in the same manner.

[730] I do not think this argument of the defence which questions the instructions has true substance. The instructions were received by AmBank. They were sent via emails from See Yoke Peng, the head of finance of SRC. She sent them to Joanna Yu's team who submitted the same to the AmBank JRC branch. The bank did the necessary confirmations with SRC and noted to such effect on the instructions themselves. The bank then duly executed the instructions. The instructions on the transfers were given effect to. The transfers took place as instructed. SRC and GMSB never lodged any complaint with AmBank Group on any unauthorized transactions involving their accounts.

[731] The fact that they were not originals and even assuming this violated the governing terms and conditions on the submission of instructions by customers, is of no consequence if the bank itself having done its own diligence, such as, say by having confirmed with SRC, decided to execute the instructions. The possibility of the signatures being 'cut and paste' does not mean they were forged. It is not unreasonable for arrangement be made that the signatories having agreed to issue the instruction, requested that their specimen signatures be affixed on the instructions, especially if they are not available to sign them.

[732] The testimony of PW42 that he did not sign them is unconvincing given the many changes in position when testifying. It is more likely that he did not remember specifically whether he had signed them. This is given his evidence that he had signed various documents as one of the signatories, and that on most occasions he just obliged the request of Nik Faisal for him to sign without truly knowing what he had signed. Thus for these instructions in

question PW42 could have agreed to the same upon being told by Nik Faisal such that the staff then proceeded to affix his specimen signatures accordingly. I cannot be emphasised enough that Nik Faisal was also at the time the mandate holder for the accused's personal accounts.

[733] Sixthly, none of the key individuals involved in the transfers of the total sum of RM42m into and out of the account of IPSB, and into those of the accused, namely Dennis See, PW37 and PW49 appeared to know the reason for the transfer, much less the identity of the holder of Accounts 880 and 906. According to PW37, Dennis See said he was merely following instructions. PW37 said he did not get the requisite information from Dennis See or PW49. And in court, PW49 testified that it was the late principal private secretary of the accused who had told him to arrange the transfers.

[734] As I had stated earlier, Dennis See was a project manager at YR1M. PW49 was the institution's CEO. Datuk Azlin, the principal private secretary of the accused who obviously had worked very closely with the accused was also a member of the board of trustees of YR1M. And the accused was the chairman of the board of trustees. The late principal private secretary could not have given the instructions without the orders by, or at least the knowledge of his superior, the accused. The bank statements of the accused too as stated earlier, make specific reference to IPSB as the transferor of the various transactions for the RM42m which were received in the accounts of the accused. Even if the accused claimed not to refer to his statements for whatever reasons, it cannot be denied that Datuk Azlin was privy to the same.

[735] In his defence statement submitted to the prosecution pursuant to s 62 of the MACC Act, the accused stated that he did not manage his own personal accounts but delegated the same to Nik Faisal and Datuk Azlin. As the principal private secretary to the accused who was entrusted among others, with that role, the reasonable inference must be that Datuk Azlin must have apprised the accused accordingly about the arrival of the RM42m and if he did not (very unlikely), he must nevertheless still have known about it at the latest when reference be made to the bank statements of the personal accounts of the accused.

[736] Evidence on the knowledge of the accused in the transfers, relevant to the fault element or the mental element of dishonesty (which will be discussed later), further supports the finding that the misappropriation was orchestrated by the accused who had been entrusted with dominion over the assets and properties of SRC, which indisputably included its funds of exactly some RM42m which had instead ended up in his own two personal accounts. The

physical element of misappropriation of entrusted property by the accused in respect of the offence of CBT under the three CBT charges against the accused has thus been established.

Another third ingredient of CBT — Whether there was conversion for the accused's own use

[737] Unlike the offence of theft where the crime concerns an accused taking an item out of a victim's possession without consent, criminal misappropriation deals with situations where the accused may have come by the item legitimately or in a legally neutral fashion but has subsequently dealt with the item in a manner the law considers as criminal. As the concept of misappropriation is wider than conversion, any conversion would likely constitute misappropriation.

[738] Conversion however involves appropriating another's property without consent and dealing with it as if it is the accused's own (see *P Durugappa vs State of Mysore* 1956 Cri LJ 630).

[739] In the context of s 405 of the Penal Code, conversion to one's own use is a distinct physical element of the offence of CBT. It is the second mode of committing CBT within the framework of s 405. And it is the contention of the prosecution that in this case the accused had also on evidence dishonestly converted to his own use the RM42m that he had dishonestly misappropriated as stated in the three CBT charges against him.

Evidence of mode of CBT and utilisation by the accused

[740] I must state that the three different offences disclosed in all the seven charges leveled against the accused for all intents and purposes mention the same RM42m from SRC. As such, evidence of how the RM42m ended up in his personal accounts and what had happened to the said RM42m would be of relevance to all the charges, although at varying degree for they would be more pertinent to the CBT charges than the other charges.

[741] Even for the CBT charges, the evidence on utilisation is necessary to show the CBT was also committed by way of the conversion of the funds to the accused's own use. At the same time, because of the same RM42m, evidence relating thereto may be repeated in different parts of the analysis on the different offences under the different charges in the different sections in this judgment, but where the context permits, it will not be unnecessarily repeated in the same level of detailed analysis.

The use of the first RM32m by the accused

Use of SRC funds by way of the transfer of RM27m to PBSB and RM5m to PPC from the accounts of accused on 29 December 2014

[742] It is the case of the prosecution that out of the RM42m, the first two transfers into the accounts of the accused, namely the RM27m and RM5m were quickly debited from the accused's personal accounts. The reason was to repay two companies, namely Permai Binaraya Sdn Bhd ('PBSB') and Putra Perdana Construction Sdn Bhd ('PPC') which had earlier in July 2014 transferred the exact sums of RM27m and in September 2014, the RM5m (thus totaling RM32m) to the accused's personal accounts when these accounts of the accused either had very low balance (Account 880) or was in overdrawn position (Account 906). In other words, the transfers from PBSB and PPC in July 2014 and September 2014 to the accounts of the accused helped regularised these accounts and ensure that cheques issued personally by the accused from these accounts were not dishonoured for lack of funds.

[743] For this purpose I find that the accused himself had signed and issued a letter dated 24 December 2014 (a crucial piece of evidence in exh P277) to Am-Islamic Bank with the instruction to transfer RM27m to PBSB on 29 December 2014 and to transfer RM5m to PPC on the same date of 29 December 2014. The mandate held by Nik Faisal did not extend to giving instruction to transfer funds out of the accounts of the accused.

[744] Thus, when on 26 December 2014, the RM27m was deposited into Account 880 from IPSB (subject to the first CBT charge) the same amount was almost immediately transferred out, on 29 December 2014.

[745] Wedani bt Senen (PW24) of AmBank testified that the accused's instruction letter (P277) had been duly processed, and confirmed that this outward transfer from Account 880 via RENTAS to the Maybank account owned by PBSB was successfully executed. Documents tendered in support included the single credit completion advice dated 29 December 2014 (P341) for transferring the sum of RM27m to PBSB's Maybank account, and the thermal receipt dated 29 December 2014 (P342) for the withdrawal of RM27m from the 880 account. In addition, the bank statement of Account 880 (P270) stated 'CASA/TD BGL TRF/DEBIT TRANSFER' of RM27m on 29 December 2014.

[746] At Maybank, Halijah bt Abdul Wahab (PW31), the assistant manager at its Kuala Lumpur Main Branch gave evidence that PBSB's account 514012042754 was maintained at the branch. Noor Lina bt Mahmud (PW32) head of RENTAS section at Maybank confirmed that on 29 December 2014, PBSB's account was credited with RM27m via RENTAS. Again, the documents tendered were the single credit confirmation advice dated 29

December 2014 (P467) for receiving the sum of RM27m, and PBSB's statement of account (P425) which recorded an entry item 'CREDIT INWARDS RENTAS AMPRIVATE BANKING-1' for the sum of RM27m on 29 December 2014.

[747] That was the RM27m, transferred to PBSB almost immediately upon receipt by Account 880 from IPSB. As stated, the RM5m which had similarly on 26 December 2014 been transferred from the account of IPSB into the accused's Account 906 account was also immediately transferred out on 29 December 2014. Instructions to Am-Islamic Bank to effect this transfer of RM5m to PPC was contained in the same letter issued and signed by the accused dated 24 December 2014 (P277) in respect of the RM27m to PBSB. In fact the letter identified the instruction for the transfer of the RM27m as 'Transaction 1' and that for the RM5m, 'Transaction 2'.

[748] Again, Wedani bt Senen (PW24) testified that the instruction letter (P277) had been duly processed and the transfer from Account 906 account via RENTAS to PPC's Maybank account successfully executed. Evidence which documented this transfer included the single credit completion advice dated 29 December 2014 (P343) for the transfer of the RM5m to PPC's account, and the thermal receipt dated 29 December 2014 (P344) for the withdrawal of RM5m from the accused's Account 906. And the statement of account for the accused's Account 906 (P110) stated 'CASA/TD BGL TRF/DEBIT TRANSFER' of RM5m on 29 December 2014. Further the bank statement for Account 906 (P110) indicated a 'DEBIT TRANSFER', for the sum of RM5m on 29 December 2014.

[749] And for the receiving bank, Halijah bt Abdul Wahab (PW31), the Assistant Manager at Maybank, confirmed the existence of PPC's account with the No 014011327183, like its related company PBSB, at its Kuala Lumpur Main Branch. PW31 and Noor Lina bt Mahmud (PW32) also testified that PPC's account was credited with RM5m via RENTAS on 29 December 2014. The evidence tendered by the prosecution in support were the single credit confirmation advice dated 29 December 2014 (P467) for receiving the sum of RM5m and the statement of account of PPC (P423) which indicated 'CREDIT INWARDS RENTAS AMPRIVATE BANKING-M' for the amount of RM5m on 29 December 2014.

The transfers from the accused's accounts of the total RM32m to PBSB and PPC were preceded by transfers from PBSB and PPC of the same amount to the accused's accounts

[750] From the banking records, PW24, the remittance manager at AmBank confirmed that earlier on 8 July 2014 PBSB had via RENTAS deposited

RM27m into the accused's Account 880. This was evidenced by the single credit confirmation advice dated 8 July 2014 (P335A) for receiving the sum of RM27m and the thermal receipt dated 8 July 2014 (P336) for the deposit of RM27m into Account 880. Further it was also shown that the statement of account for Account 880 (P270) stated 'CREDIT TRANSFER' for the sum of RM27m on 8 July 2014.

[751] As for the RM5m, the transfer from PPC to Account 906 was also effected via RENTAS, on 10 September 2014, as confirmed by PW24, by referring to the statement of account for Account 906 (P110) which contained an item which plainly stated 'CREDIT TRANSFER, PUTRA PERDANA CONSTR, MFBBMYKL' for the sum of RM5m on 10 September 2014.

Relevance to conversion — Reason for the transfers to PBSB and PPC

[752] As such, thus far, whilst the charges, at least for the first two CBT charges which relate to the aggregate sum of RM32m, focus on the receipt of that SRC funds from IPSB in December 2014 by the accused's Accounts 880 and 906, money trail embedded in banking documents reveal that first, that same amount was transferred from the same two accounts of the accused to PBSB and PPC almost immediately upon receipt in December 2014. Secondly, as just stated, the same accounts of PBSB and PPC had in fact earlier transferred in July and September of the same year respectively, funds of the same amount (RM27m and RM5m) into the same Accounts 880 and 906.

[753] The prosecution says this constitutes a repayment to PBSB and PPC of the total advances of RM32m. The defence asserts this is a mere reversal of transaction. I cannot accept the latter's contention. Because of two principal reasons. First, the audited consolidated financial statements of Putrajaya Perdana Bhd (which thus includes two of its subsidiaries, PBSB and PPC) for the financial year ended 2014 (D661), in particular in its notes recorded in para 17.2 of p 66 appear to describe the transfers which involved PBSB and PPC with the two accounts whose owner was not disclosed therein (factually the accused's) as a loan and repayment exercise.

[754] Secondly, for purposes of establishing conversion to one's use under the law, or even more so in the context of misappropriation, it is quite unnecessary to determine whether the purpose of the transfers by the two personal accounts of the accused to PPC and PBSB in December 2014 was a loan repayment or otherwise. For what has been made manifest on evidence is that the funds of SRC of RM32m which had been entrusted to the accused had been debited out of SRC and subsequently utilised, in this instance, by the transfer of that amount to PPC and PBSB.

[755] Nor can the accused claim that the transfers of RM32m to PBSB and PPC by him pursuant to his instruction to Am-Islamic Bank (P277) is a reversal (instead of a repayment) in the form of a reimbursement. It makes no difference because in all cases, either it was a repayment, reversal or reimbursement, or even a restitution, the fact remain that in this case, the entrusted property did get wrongfully transferred out of the account of the owner. As will be discussed further, that already completes the crime of CBT. It gets compounded in this case as the funds then arrived in the personal accounts of the accused. If the earlier withdrawal does not complete the offence, this crediting of the impugned funds into the personal accounts of the accused absolutely does. The reason for the utilisation of the funds by the accused subsequent to receipt bears no relevance to the commission of the offence. Reversal or reimbursement is no defence.

[756] This pointed observation by NH Chan J (as he then was) in the case of *Public Prosecutor v Mohammad Abdullah Ang Swee Kang* [1987] 2 MLJ 368 merits reproduction:

> Mr Fernandez has said that there was no loss suffered by MOIC because it had got its money back. But that is not the point. This is not a view which this court can accept. The point is that the accused had made use of the money of MOIC as if it was his own. He had used it to assist NARSPRO as to which MOIC had no interests or connections. The courts have to mark publicly the gravity of the crime and the sooner company directors realise that the funds of their companies are not theirs to spend or disburse as their own the better it is for the economic well-being of the country.

[757] The argument that the deposit of the RM27m and RM5m into the personal accounts of the accused did not benefit him as the exact same amount was immediately debited out of these accounts or a mere 'reversal' is utterly devoid of logic and is of no support to his defence.

[758] As I have stated earlier, conversion involves dealing with another's property as if it is one's own, without consent. An accused would not be committing conversion if he merely retains the property without any dealing with the property in the sense of using it. Section 405 of the Penal Code refers to 'conversion to his own use' which should be interpreted ordinarily and literally to encompass situations which includes where the entrusted property is dealt with by an accused by giving the same to another party for the latter's use. In other words, in that situation, by an accused handing over the property to another for the latter to deal with or make use of, the accused has already committed conversion of the entrusted property for the accused's own use.

[759] Similarly, in this case, by transferring the SRC's RM32m, over which the accused was entrusted with dominion, to other entities (PBSB and PPC),

the accused had plainly converted the RM32m to his own use. No other interpretation could be ascribed to this transfer by the accused regardless of the motive or reason for the transfer.

Previous utilisation of the funds from PBSB and PPC by the accused

[760] It is noteworthy that before the credit of the RM27m into Account 880 on 8 July 2014, the balance in the account was only RM194,054.34. And as for Account 906, before the credit of the RM5m from PPC on 10 September 2014, its balance was in the negative — overdrawn by RM4,731,922.97.

[761] In any event, the evidence on the flow of funds and money trail exhibits that the initial transfers of the aggregate sum of RM32m from PBSB and PPC to the two personal accounts of the accused in July and September 2014 had been utilised by the accused himself.

[762] Importantly, the same bank statement for this Account 880 (P270) belonging to the accused recorded its immediate utilisation, as recorded by the item 'CASA/TD BGL TRF/DEBIT TRANSFER' of RM20m on 8 July 2014. And to give a full picture, in the course of four days, the remaining RM7m was also utilised as recorded in the same bank statement (P270), thus 'CASA/TD BGL TRF/DEBIT TRANSFER' of RM20m on 8 July 2014; 'CASA/TD BGL TRF/DEBIT TRANSFER' of RM3m on 23 July 2014; 'CASA/TD BGL TRF/DEBIT TRANSFER' of RM3,282,734.16 on 13 August 2014; 'DEBIT TRANSFER' of RM500,000 on 3 September 2014; and 'DEBIT TRANSFER' of RM418,271.71 on 17 September 2014.

[763] The testimony of AmBank JRC branch manager, Uma Devi Raghavan (PW21) further confirmed that Nik Faisal had issued an instruction to Am-Islamic Bank in a letter dated 8 July 2014 (P271) to first debit RM20m from the Account 880 (which had received the RM27m on the same day) and to then deposit RM10m each to Account 906 and Account 898. This is duly reflected in the respective statements of account for Account 906 (P110) and Account 898 (P109) which both stated 'CREDIT TRANSFER' of RM10m each on 8 July 2014.

[764] According to PW21, there were further instructions given by Nik Faisal on intra-accounts transfers. Again, the debiting out of funds was mainly performed out of Account 880, which had received the RM27m from PBSB. Thus is another letter dated 23 June 2014 (P273) and the instruction was for the sum of RM3m to be debited from Account 880. In addition the same instruction included that out of that RM3m, deposit of RM2m be made to Account 906 and RM1m to Account 898. Again, this is consistent with the records in the statements of accounts of Account 906 (P110) which specifies

'CREDIT TRANSFER' of RM2m and of Account 898 (P109) which indicates 'CREDIT TRANSFER' of RM1m on 23 July 2014.

[765] That is not all. In another letter dated 11 August 2014 addressed to Am-Islamic Bank (P275), Nik Faisal instructed that an exact sum of RM3,282,734.16 be debited from Account 880 on 13 August 2014. The instruction made it clear that out of that sum, a sum of RM449,586.95 be transferred and credited into a personal credit card account which belonged to the accused, which was his Visa Platinum Credit Card (No 458581800005496) and another higher amount of RM2,833,147.21 be credited into another of the accused's credit card account which was his MasterCard Platinum Credit Card (No 5289438000038961).

[766] Again, banking records substantiate these credit cards payments in the form of the thermal receipt dated 13 August 2014 (P276) for the debit of RM3,282,734.16 from the 880 Account, as well as the Visa Platinum Credit Card statement (P587) which showed a payment of RM449,586.95 made on 13 August 2014, and the MasterCard Platinum Credit Card statement (P587) which recorded a payment of RM2,833,147.21 also made on 13 August 2014. Yeoh Eng Leong (PW47), a senior vice president at AmBank's Credit Card Authorisation and Banking Fraud Management Department, testified to the accuracy of the credit card statements (P587).

[767] Upon the debit transactions on 13 August 2014, the balance in Account 880 fell to RM916,449.70. The next series of remittances of significant sums into this Account 880 started on 10 December 2014 which the accused says forms part of the fourth tranche of the Arab donations.

[768] As for the RM5m from PPC, its use was different. But it was also for the personal benefit of the accused. Evidence in the form of the statement of account for the Account 906 (P110) shows that the account was in the negative or overdrawn by RM4,731,922.97 on 9 September 2014. The entire sum of RM5m from PPC was, as mentioned earlier transferred via RENTAS on 10 September 2014 as confirmed by PW24, fully utilised on the very same day by deducting the overdrawn sum in the same account and thus regularising the balance of that Account 906. Such that, the final balance on 10 September 2014 remaining in Account 906 was merely RM268,077.03.

[769] All these payments, utilised from the funds of RM27m sourced from PBSB and RM5m from PPC were crystal clearly for the personal benefit of the accused. And it is for this reason that the accused instructed on 24 December 2014 (in exh P277) for the RM32m received from SRC on 26 December 2014 be transferred to PBSB and PPC on 29 December 2014 as repayment of the advances by PBSB and PPC to him.

[770] As such, the use of PBSB and PPC funds by the accused is relevant to the CBT charges because of the evidence of payment back of the same sum of RM27m to PBSB and RM5m to PPC, both in December 2014. In other words, the SRC funds of RM27m and RM5m was used by the accused to repay PBSB and PPC the same amount of advance earlier extended by PBSB and PPC, respectively, to the accused in July 2014 and September 2014, which the accused had then almost instantaneously fully utilised on.

Use of RM10m (third CBT charge)

[771] As for the RM10m which was on 10 February 2015 transferred from IPSB to Account 880 account, the entire sum was immediately transferred out. For this a letter was issued by Nik Faisal dated 9 February 2015 (P278) to Am-Islamic Bank to transfer RM10m to Account 906.

[772] The branch manager of AmBank JRC branch, Uma Devi Raghavan (PW21) testified that the said instruction was duly processed and executed by Am-Islamic Bank. Documents tendered by the prosecution also confirmed this, such as the thermal receipt dated 10 February 2015 (P279) for the transfer of RM10m from Account 880 to Account 906 account, as well as the statements of accounts for these two personal accounts of the accused. Thus, the statement for Account 906 (P110) shows 'CREDIT TRANSFER DATO SERI MOHD NAJIB, 2112022011880' for the sum of RM10m on 10 February 2015, and correspondingly the statement for Account 880 (P270) indicated 'DEBIT TRANSFER' of the RM10m on 10 February 2015.

[773] For this tranche there is no related transactions involving other parties, such as PBSB and PPC like for the RM32m. And the use of the RM10m is more directly shown, and also plainly for the benefit of the accused as the owner and holder of Accounts 880 and 906. The statement of account for this Account 906 (P110) indicates that the account was already overdrawn by RM2,333,084.03 on 9 February 2015, being the date prior to the transfer date, such that this deposit of RM10m into Account 906 regularised this position into a positive balance, which means that cheques already issued by the accused could be cleared and more such cheques could be written by him.

[774] Not only that. Whilst regularisation of his own personal account is necessarily already for his personal benefit, this is further doubly confirmed if scrutiny is made on the evidence of the purposes of the cheques issued by the accused out of that Account 906. And these were cleared because of the credit item of the SRC's owned RM10m on 10 February 2015 from IPSB.

[775] The testimony of Badrul Hisham bin Mohamad (PW5), a senior manager at the Cheque Clearing Centre, Am-Islamic Bank, confirmed that 14

cheques (marked as exhs P83–P96) had been issued from Account 906 account and one cheque (P97), from Account 898.

Objection against the calling of witnesses to show utilisation of the SRC funds

[776] Before the prosecution called its witnesses who would confirm receipt of these cheques, the defence had raised a preliminary objection pursuant to s 5 of the Evidence Act 1950 on the relevancy of the testimony of cheque recipients to the seven charges against the accused.

Section 5 of the Evidence Act 1950 reads:

> Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.
>
> Explanation — This section shall not enable any person to give evidence of a fact which he is disentitled to prove by the law relating to civil procedure.

[777] The defence also made an oral application for this court to rule on the admissibility of such intended evidence, under s 136 of the Evidence Act 1950, arguing that such evidence would not be relevant.

[778] Section 136 reads as follows:

> 136 Court to decide as to admissibility of evidence
>
> (1) When either party proposes to give evidence of any fact, the court may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the court shall admit the evidence if it thinks that the fact, if proved, would be relevant, and not otherwise.
>
> (2) If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first mentioned, unless the party undertakes to give proof of the fact and the court is satisfied with the undertaking.
>
> (3) If the relevancy of one alleged fact depends upon another alleged fact being first proved, the court may, in its discretion either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact.
>
> *ILLUSTRATIONS*
>
> (a) It is proposed to prove a statement about a relevant fact by a person alleged to be dead, which statement is relevant under section 32.
>
> The fact that the person is dead must be proved by the person proposing to prove the statement before evidence is given of the statement.

(b) It is proposed to prove by a copy the contents of a document said to be lost. A

The fact that the original is lost must be proved by the person proposing to produce the copy before the copy is produced.

(c) *A* is accused of receiving stolen property, knowing it to have been stolen. B

It is proposed to prove that he denied the possession of the property. The relevancy of the denial depends on the identity of the property. The court may in its discretion either require the property to be identified before the denial of the possession is proved or permit the denial of the possession to be proved before the property is identified. C

(d) It is proposed to prove a fact (*A*) which is said to have been the cause or effect of a fact in issue. There are several intermediate facts (*B*, *C* and *D*) which must be shown to exist before the fact (*A*) can be regarded as the cause or effect of the fact in issue. The court may either permit *A* to be proved before *B*, *C* or *D* is proved or may require proof of *B*, *C* and *D* before permitting proof of *A*. D

[779] The crux of the contention of the counsel for the accused was that the use of the proceeds had nothing to do with the charges on the offence of money laundering because the three money laundering charges are based on the receipt of proceeds from unlawful activity. Whereas the proposed evidence on the purposes of the cheques would relate to the spending of those proceeds. Further it is argued that such evidence on spending would also be irrelevant to the three charges in respect of CBT and the single abuse of position charge under s 23 of the MACC Act. The prosecution opposed this request, arguing that the prosecution ought not to be prevented from presenting its evidence to prove its case against the accused. E F

[780] After hearing short submissions from both sides, I ruled against the accused and allowed the witnesses to show the spending by the accused be called to testify. I acknowledged that under s 5 of the Evidence Act 1950 the court is empowered to ask a party proposing to give evidence of any fact in what manner the alleged fact, if proved would be relevant. For admissibility is a question of law. G H

[781] Further even though a party is entitled to subpoena any person as a witness the burden in on that party to show in what way the person subpoenaed could give any relevant evidence (see the Supreme Court decision in *Wong Sin Chong & Anor v Bhagwan Singh & Anor* [1993] 3 MLJ 679). Thus the essence of s 136 is to act as a judicial mechanism to ensure only relevant evidence is admitted. I

[782] In this case, I was satisfied that evidence on spending by the accused, if proved could potentially be relevant to first, the element of 'dishonesty' under s 409 of the Penal Code concerning the three CBT charges, and secondly the mental element of the money laundering offence which permits, under s 4(2) of the AMLATFPUAA, for inference be made from any objective factual circumstances. That subsection reads:

> (1) For the purposes of subsection (1), it may be inferred from any objective factual circumstances that —
>
> a) the person knows, has reason to believe or has reasonable suspicion that the property is the proceeds of an unlawful activity or instrumentalities of an offence; or
>
> b) the person without reasonable excuse fails to take reasonable steps to ascertain whether or not the property is the proceeds of an unlawful activity or instrumentalities of an offence.

[783] Thirdly, evidence of utilisation would be directly relevant as a pre-requisite to prove the element of conversion for one's use as a mode of the commission of criminal breach of trust in respect of the three CBT charges.

[784] Furthermore, in any event, s 8(2) of the Evidence Act 1950 also makes conduct, whether previous or subsequent, relevant. The conduct of any person against whom a charge is made, is as such relevant if the conduct influences or is influenced by any fact in issue or relevant fact. The conduct may be previous or subsequent to the fact in issue.

[785] Section 8 of the Evidence Act 1950 reads:

> 8 Motive, preparation and previous or subsequent conduct
>
> (1) Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.
>
> (2) The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to that suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant if the conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.
>
> Explanation 1 — The word 'conduct' in this section does not include statements unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of this Act.
>
> Explanation 2 — When the conduct of any person is relevant any statement made to him or in his presence and hearing which affects his conduct is relevant.

[786] The relevancy of subsequent conduct was explained by Raja Azlan Shah J (as HRH then was) in *Chandrasekaran & Ors v Public Prosecutor* [1971] 1 MLJ 153 as follows:

> The evidence of subsequent conduct is relevant under s 8 of the Evidence Ordinance and may properly be taken into account, after the prosecution has established the guilt of the accused, to reinforce the satisfaction of the court as to the proof of guilt made out by the prosecution case (see *Chandika Prasad v Emperor* 126 IC 684).

Evidence of 15 cheques re the third CBT charge

[787] The prosecution then tendered the following 14 cheques issued from Account 906, through the respective beneficiaries of the same:

(a) Am-Islamic Bank cheque No 000206 for the sum of RM240,000 dated 30 January 2015 (P83) issued to Vital Spire Sdn Bhd, and received by Onn Hafiz Ghazi (PW16), a shareholder of the company. PW16 gave evidence that the funds was used to operate an online news portal, *malaysiandigest.com* (now defunct) as personally directed by the accused, focusing on political developments locally and internationally. The statement of account (P110) confirmed that the cheque was cleared on 5 February 2015;

(b) cheque image for Am-Islamic Bank cheque No 000207 for the sum of RM2.5m dated 2 February 2015 (P84) issued to a law firm Zulqarnain & Co. This was received by Ashraf bin Abdul Razak (PW18) on behalf of Habibul Rahman Kadir Shah (PW23). The latter testified that this funds was for reimbursement of his expenses undertaking political intelligence work for the political party of the accused. The bank statement (P110) showed that the cheque was cleared on 5 February 2015;

(c) Am-Islamic Bank cheque No 000210 for the sum of RM300,000 dated 8 February 2015 (P85) issued to Centre for Strategic Engagement Sdn Bhd. This was received by its co-founder Sim Sai Hoon (PW14) who testified that the organisation was paid RM150,000 a month to monitor and provide analysis on the news content of six Chinese newspapers to the PMO's media office. The bank statement (P110) recorded that the cheque was cleared on 10 February 2015;

(d) Am-Islamic Bank cheque No 000213 for the sum of RM238,914 dated 12 February 2015 (P86) issued to Lim Soon Peng which was received by Datuk Wong Nai Chee (PW17), then a political secretary to the accused at the PMO. PW17 confirmed that the purpose was for Tan Sri Lim Soon Peng to pay two media units for their work in projecting government policies to the Chinese community in the right manner.

One of which did the work on the 'Ah Jib Gor' Chinese-language Facebook for the accused. The bank statement (P110) recorded that the cheque was cleared on 13 February 2015;

(e) Am-Islamic Bank cheque No 000214 for the sum of RM100,000 dated 12 February 2015 (P87) issued to ABS Trend Master Sdn Bhd, a contractor firm, and received by its owner, Zulkarnain Mohamad (PW6) for the purpose of building an outdoor storeroom and some repair works at the accused's personal residence in Kuala Lumpur. The statement of account for Account 906 (P110) stated that the cheque was cleared on 17 February 2015;

(f) Am-Islamic Bank cheque No 000219 for the sum of RM1m dated 13 February 2015 (P88) issued to the Sabah based political party, United Pasokmomogun Kadazandusun Murut Organization (UPKO). Its former treasurer general Datuk Seri Dr Makin @ Marcus Mojigoh (PW15) confirmed receiving the cheque personally from the accused at the PMO, adding that the amount was only half of what was requested. PW15 testified that the purpose of the funds was for UPKO, then a component party of the ruling Barisan Nasional led by the accused to undertake CSR projects. The bank statement (P110) showed that the cheque was cleared on 17 February 2015;

(g) Am-Islamic Bank cheque No 000217 for the sum of RM400,000 dated 12 February 2015 (P89) issued to the Trustees of Rumah Penyayang Tun Abdul Razak and received by Abdul Munir Othman (PW11), one of the trustees, for the purpose of contributing towards the fulfilment of the various needs of the orphans at the welfare home in Pekan, including for expenses on accommodation, food, clothing and transportation. The statement for Account 906 (P110) confirmed that the cheque was cleared on 17 February 2015;

(h) Am-Islamic Bank cheque No 000220 for the sum of RM1m dated 17 February 2015 (P90) issued to Solar Shine Sdn Bhd. This was received by its owner, Dato' Lew Choon Lai (PW22), who gave evidence that the payment was used to promote the 1Malaysia campaign nationwide, and targeted at the non-Malay segment of the communities. The bank statement (P110) showed that the cheque was cleared on 17 February 2015;

(i) Am-Islamic Bank cheque No 000212 for the sum of RM50,000 dated 12 February 2015 (P91) issued to Asmadi Abu Talib (PW9), an UMNO division chief. PW9 confirmed receiving the cheque from the accused himself when the two met. He added that even though it was paid in his name instead of that of the UMNO division, the funds was used for the social and political activities of the division. The bank statement (P110) showed that the cheque was cleared on 17 February 2015;

(j) Am-Islamic Bank cheque No 000215 for the sum of RM13,800 dated 24 February 2015 (P92) issued to Manisah bt Othman (PW12) who confirmed its receipt. PW12 is a statistician at the Department of Statistics. Her late husband was at one time a private secretary of the accused when he was Education Minister. The payment was to assist in her children's education. The bank statement (P110) showed that the cheque was cleared on 24 February 2015;

(k) Am-Islamic Bank cheque No 000221 for the sum of RM56,500 dated 24 February 2015 (P93) issued to MOZ (Malaysia) Sdn Bhd, a plumbing firm. This was received by its owner, Mohamed Zakariya Zearat Khan (PW7) who testified that this was for the purpose of a water tank installation works at the accused's private residence in Kuala Lumpur. The bank statement (P110) records that the cheque was cleared on 25 February 2015;

(l) Am-Islamic Bank cheque No 000226 for the sum of RM1m dated 26 February 2015 (P94) issued to Badan Perhubungan UMNO Negeri Pulau Pinang and received by Ahmad Sahar Shuib (PW13) who was its executive secretary. PW13 confirmed that the payment was used for funding welfare activities for the less fortunate, disaster relief works and other party expenditures. He also said it was common practice for state divisions to receive funds from the President of the party. The statement for Account 906 (P110) recorded that the cheque was cleared on 26 February 2015;

(m) Am-Islamic Bank cheque No 000222 for the sum of RM77,300 dated 24 February 2015 (P95) issued to Syadilah Enterprise, a contractor business, and received by Daud Muhammad (PW8), its sole proprietor. PW8 testified that the funds was for repair works at the accused's residence in Pekan, including the installation of two new water tank towers. The bank statement (P110) indicated that the cheque was cleared on 28 February 2015; and

(n) Am-Islamic Bank cheque No 000224 for the sum of RM300,000 dated 26 February 2015 (P96) issued to UMNO Bahagian Johor Bahru and received by Abu Talib Alias (PW10), the division's secretary. PW10 said the purpose was to fund the division's operations and activities. The bank statement (P110) shows that the cheque was cleared on 3 March 2015.

[788] The one cheque issued by the accused from Account 898 is the Am-Islamic Bank cheque No 000303 for the sum of RM3.5m, dated 21 January 2015 (P97) issued to the law firm Hafarizam, Wan & Aishah Mubarak. The recipient was not called to testify.

[789] In any event, even though the bank statement for this Account 898 (P109) records that the cheque was cleared on 22 January 2015, there was an error during the clearing process which resulted in only RM3,500 being initially debited from that Account 898. Badrul Hisham bin Mohamad (PW5) from the cheque clearing centre, Am-Islamic Bank, confirmed this error and steps were taken by Am-Islamic Bank to have the short fall of RM3,496,500 debited to CIMB. Uma Devi Raghavan (PW21) confirmed that Nik Faisal had to issue a letter dated 10 February 2015 (P284) to Am-Islamic Bank to transfer RM3.5m from the Account 906 account to the Account 898.

[790] The shortfall of RM3,496,500 was then debited from the RM3.5m that had been deposited into Account 898. The same was executed on 11 February 2015, and all three statements of Accounts 906, 898 and 880 recorded the requisite entries. Thus the statement for Account 906 (P110) recorded 'DEBIT TRANSFER' of RM3.5m on 11 February 2015, the statement for Account 898 (P109) which showed 'CREDIT TRANSFER, DATO SERI MOHD NAJIB, 2112022011906' for the sum of RM3.5m on 11 February 2015, and the statement for Account 898 (P109) stated 'CASA/TD BGL TRF/DEBIT TRANSFER' for the sum of RM3,496,500 on 11 February 2015.

Observations on the use of the RM42m by the accused

[791] Three key observations may be made. First, all the 15 cheques were personally written by the accused himself. This was confirmed by some of the recipients themselves who saw the accused signing the cheques. The defence team for the accused too, in cross-examination did not suggest that he did not. In any event, the mandate granted to Nik Faisal did not extend to him issuing cheques or transferring funds out of any of the three personal accounts of the accused.

[792] Secondly, the 15 cheques involved the payments of a total sum of RM10,776,514. As I stated earlier, the statement of account for this Account 906 (P110) out of which the 14 cheques were issued, had indicated that the Account 906 was already overdrawn by RM2,333,084.03 on 9 February 2015, being the date prior to the transfer date, such that this deposit (from Account 880 which had originally received the SRC's RM10m from IPSB) of RM10m into Account 906 made possible the regularisation of this overdrawn position into a positive balance, which means that as has been shown, cheques already issued by the accused could be cleared (two of them) and more such cheques (the other 12) could be written by him.

[793] Thirdly, the records of the three personal accounts of the accused, which as has been shown in the respective statements of accounts, registered negative

or relatively low balances immediately prior to the deposits of the RM42m from IPSB at the relevant dates into the pertinent accounts. However, considering the 15 cheques payments and the transfers by the accused pursuant to his instruction (P277) of RM32m to PBSB and PPC, the total spending out of the SRC's RM42m credited to his accounts was a total amount of RM42,776,514.

Misappropriation and conversion have been proven

[794] As such I find that the element of conversion of the SRC's RM42m over which the accused was entrusted with dominion, to the accused's own use, subject to the three CBT charges within the meaning ascribed to it under s 405 of the Penal Code, to be firmly established, in view of the extensive and overwhelming evidence of the utilisation of the same by the accused. In my judgment based on the totality of evidence at the end of the prosecution stage, the ingredient of misappropriation, as is conversion for the accused's own use, has been established.

OTHER ISSUES ON MISAPPROPRIATION AND CONVERSION

Whether purposes of the cheque payments are for CSR or for the benefit of the accused

[795] The learned lead senior counsel and his team, as I said, did not during the cross-examination of the witnesses who had received payments from the accused try to deny the accused had written those cheques himself. Instead the focus appears to be on the purposes of the payments which included those which appeared to be charitable in nature as well as mainly for those benefitting the society. As I have stated, the reasons or purposes of spending after misappropriation or conversion are not relevant to the charges. Regardless, a number of these payments are plainly political in purpose (for example as testified by PW14, PW16, PW17 and PW23), and some others are directly given to political parties even though the uses could have also benefited the less fortunate in the society.

[796] And some others are directly spent by the accused for renovation and repair works at his private residences. Also, one is to assist the family of a former staff of his and another was to fund the expenses of an orphanage in his own parliamentary constituency, operated by a foundation of which the accused himself is a patron. In short, I fail to see how all these are not meant for the accused's personal benefit, indirectly if not directly.

[797] Any contention that the funds were spent by the accused for CSR-related purposes is in my view patently misconceived. As has been stated,

whilst some could be generously construed as charitable and intended to assist the social and economic wellbeing of the less fortunate of the society, they at the same time promoted the personal interest and political standing of the accused.

[798] And in the first place, the layering of the transactions by the use of two intermediaries too reeks of an attempt to conceal the fact that the source originated from SRC. Further, whilst PW49 did testify that she was told by the late Datuk Azlin about the sums to be transferred from IPSB to two accounts (whose holder was then not disclosed), and she then told PW37 of IPSB that the transfers were for CSR purposes (which is convenient because IPSB only does CSR works), evidence reveals that the same was in fact utilised for the personal benefit of the accused.

[799] As shown earlier, out of the RM42m, RM32m was instructed by the accused himself in P277 to be transferred to PBSB and PPC, and the remainder RM10m expended through the issuance of the 15 personal cheques by the accused. Nor is there any evidence that the accused is authorised by any of the companies — SRC, GMSB or IPSB to carry out CSR activities. And as I have stated neither was there any complaint of unauthorised transactions to the relevant banks by either the accused himself or any of the companies involved.

[800] I am not unmindful that this argument that these were CSR-related expenses is to advance the related suggestion that the spending were CSR-related because the SRC's RM42m which was credited from IPSB's account into the accused's Account 906 and Account 880 was in fact meant for CSR activities, more so since it came from IPSB, which carried out legitimate CSR projects.

[801] Now even if this were true, still, the purposes of the spending by the accused cannot, given the evidence, be divorced from being for his personal interest and benefit as well. None of the payments by the accused has anything whatsoever to do with either SRC, GMSB or IPSB. In any event, there is not a shred of evidence that the RM42m was legitimately transferred to the accused, let alone intended for use by the accused for CSR purposes. There is no document or testimony to even hint that the accused was a person duly authorised to carry out CSR projects for any of the three companies.

Whether there were forged and scanned documents based on cut and paste signatures which negate evidence of misappropriation and conversion

[802] The defence repeats and makes much of the contention that the said SRC funds had been disbursed on the basis of forged instruments and scanned letters. The signatures of the signatories therein were 'cut and paste' and sent to the bank as scanned copies. Learned senior counsel had after demonstrating a

comparison using transparencies of the relevant documents vis a vis the signatures of PW42 managed to get PW42 to agree that his signatures on the various instructions were identical and indeed were 'cut and paste' and then photocopied on the other documents. PW42 as a result then denied having signed these documents.

[803] The defence submitted that evidence from PW42 established that his signatures on the transfer instructions were forged. This was after the witness was shown in court that all 17 signatures purported to be his on the transfer instructions to Am-Islamic Bank were identical and must have been copied from elsewhere. In other words, a cut and paste job by someone, repeated many times over.

[804] In my view, as stated earlier, the contention that PW42 could not have written his signatures in identical fashion is reasonable. That he did not actually even sign any of the transfer instructions alongside Nik Faisal is also not unreasonable. But this does not weaken the case of the prosecution. For several reasons. First, even though PW42 testified that it was possible that he could not have signed the transfers upon being shown of the identical feature of all of the signatures attributed to him, he never said that he would not have put his signature on the transfer instructions. In fact in his witness statements he made it clear he had signed them, in accordance with the requests from Nik Faisal the CEO. PW42 did not find anything wrong with the transfer instructions. PW42 in fact confirmed that the transfers were executed on the instructions of 'pihak atas' as told to him by the CEO, Nik Faisal. The witness confirmed that he understood 'pihak atas' to be a reference to the accused.

[805] What is clear from his testimony is that he could not exactly remember what he had signed. Which is not unexpected either. The material period in question is about five years before he testified in this court, and not to mention the intervening deteriorating health which even resulted in PW42 suffering a stroke. And it was also shown by the prosecution in re-examination that even the signatures of Nik Faisal on the same transfer instructions were the product of cutting and pasting.

[806] Secondly, I reiterate that there was nothing wrong with having transfer instructions which bear a photocopied signature or a digital signature of a signatory. It is a generally accepted business practice, for as long as the signatory agreed to the subject matter of the document containing the signatures, and for his sample signature be used for any such purpose, and for any additional requirements that may be imposed by counterparties such as the banks.

[807] I agree with the contention of the prosecution that it is settled banking law and practice that the customer, like the accused is legally and contractually

obliged to scrutinise, verify, and be held responsible for all transactions conducted in his current accounts. The accused's account holder's acceptance of the terms, inter alia, of the opening of his current accounts with AmBank in P57(1), P58(1) and P59(1) respectively is produced verbatim below:

> I/we hereby acknowledge that I/We
>
> (i) voluntarily open this account
>
> (ii) responsible for all transactions conducted under the account
>
> (iii) will scrutinize and verify all transaction under this account
>
> (iv) shall be liable for all transactions through the account which are in violation of the Law.

[808] It is no surprise that these transactions were given effect to because the signatures on the instruction letters appeared similar to the one on the specimen signature. In addition, confirmation was, as per standard process, and based on the notations on the instruction letters, obtained from representatives of SRC and GMSB for the transfers to be executed. In any event, all transactions were recorded in all the relevant bank statements for each of the accounts. Also, as the prosecution correctly submits, the bank could act on the scanned copies of letters as this is customary practice especially applicable as the signatories were often out of the country. At any rate, SRC had not to date questioned the legitimacy of the transactions carried out using scanned copies. As such the dispute on the execution of the transfers raised by the defence now is nothing but a convenient afterthought.

[809] The bank in the instant case was authorised to accept such signatures in accordance with the letter of indemnity as confirmed by the relationship manager of the accounts of the accused, PW54. It is significant to note that the relevant AmBank officers had even sought confirmation of the various transfers addressed to the bank with the finance officers of SRC and GMSB. There was absolutely no dispute on the transfer instructions.

[810] In my view it was likely that Nik Faisal himself who was the link person in SRC with the accused and the mandate holder for the accused's three private accounts at AmBank or another person acting on his instruction who had prepared the transfer instructions and placed the specimen signatures of both Nik Faisal and PW42 on them.

[811] And neither was there any suggestion let alone evidence that there had been any wrongful credit or debit of monies which amounted to millions in RM out of the accounts of SRC and GMSB on the basis of the cut and paste copied signatures. Not by SRC or GMSB, and not by any other party.

Whether reversal is repayment by accused

[812] Nor do I find the defence's argument that the transfers from the accused's accounts to PBSB and PPC were 'reversal transactions' orchestrated by Jho Low in order to effect a reversal of some RM170m alleged to have been received by SRC from PPB Group. As I have set out earlier, the RM32m transferred from the accused's accounts to PBSB and PPC was the repayments of an equivalent sum earlier transferred from those same companies to two of the accused's accounts on 8 July 2014 and 10 September 2014.

[813] I have even set out the evidence on the use of the sums from these two companies by the accused. And the PPB Group's audited financial statements (D661) also records that PPC and PBSB had received the RM5m and RM27m in December 2014 as payment of the amounts advanced to a 'second third party'. In her testimony, PW54, the relationship manager for the accused's personal accounts testified that her understanding is the 'second third party' refers to the accused.

Whether transactions concerning Mail Global Resources are relevant to present charges

[814] There were also many transactions which concern payments to an entity known as Mail Global Resources. Even if this was part of a larger scheme which the defence alleges had also defrauded the accused, I find they were irrelevant to the three CBT charges against the accused, which manifestly relates only to the remittances of the RM42m from SRC to Accounts 880 and 906 through GMSB and IPSB.

Whether transfers were perpetuated at the behest of Jho Low

[815] As has been shown, the sum of RM10m was credited in the accused's account in February 2015 and evidence demonstrates that this sum was primarily utilised to regularise the accused's overdrawn account. It was upon the receipt of the RM10m in the accused's account that enabled him to issue and honour the 15 personal cheques that he had signed. The defence argued that it was Jho Low who gave the instruction for the transfer from SRC to the personal accounts of the accused (through GMSB and IPSB). As I have mentioned more than once PW49 testified that she was told by the late Datuk Azlin to ask the MD of IPSB (PW37) to effect the crediting of the RM10m to the accused's accounts from IPSB.

[816] In my view even if this contention of the defence was true, and even if Jho Low was the one giving overall directions on the many and various transfers of sums of monies, it does not detract from the finding of misappropriation or

A conversion of the RM42m on the part of the accused. Evidence establishes the role played by Nik Faisal in the transfers from SRC to GMSB and from GMSB to IPSB, and that played by Datuk Azlin in respect of the stage of the transactions from IPSB to Accounts 880 and 906 of the accused.

B **[817]** Nik Faisal was the first CEO of SRC and remained its director and authorised signatory during the relevant period of the flow of funds and he was also in an especially privileged position as the accused's appointed mandate holder for the personal bank accounts of the accused including the ones subject to the charges. Datuk Azlin was the accused's own principal private secretary at
C the PMO and was also a member of the board of trustees of YR1M. On top of all this, the accused specifically stated in his s 62 of the MACC Act defence statement that Nik Faisal and Datuk Azlin were the individuals whom the accused tasked with managing his personal accounts.

D **[818]** As such if the argument of the defence is that Jho Low was the real mastermind, which is not implausible from the evidence of the BBM messages between him and Joanna Yu (PW54), such a version would still be entirely consistent with the prosecution case and does not in any manner dilute the
E involvement of the accused in the criminal enterprise as charged.

Another third ingredient of CBT — Whether the CBT was committed by disposal in violation of any direction of law

F **[819]** Having established that the criminal breach of trust under s 409 had been effected by the accused by way of misappropriation and conversion for own use, I wish to deal with only one other mode of committing CBT under the said statutory provision. This is where the prosecution submitted that the evidence shows that the accused has also dishonestly disposed or used the
G entrusted property in violation of direction of law prescribing the mode in which such trust is to be discharged. This is the third mode of committing criminal breach of trust under s 405 of the Penal Code.

[820] I agree with the submission of the prosecution that the words 'direction
H of law' found in s 405 connotes that there must be a specific degree for the direction of law. In other words, it should not be construed in an expansive manner to even extend to a general direction to act honestly. And consonant with my earlier ruling that the three CBT charges are not defective, I also agree that it is not mandatory to specify the particular direction of law that has been
I breached in the charge, and that specific evidence should instead be led in order to properly identify the direction of law said to have been violated.

[821] In a case referred to by the prosecution, the High Court, in the judgment of Abdoolcader J in *Public Prosecutor v Datuk Haji Harun bin Haji*

Idris & Ors [1977] 1 MLJ 180stated:

> Now turning to the charge of criminal breach of trust, s 405 of the Penal Code defines this offence and specifies some five modes in which it can be committed. In this case it would appear that it has been proved both cumulatively and severally that the second accused has dishonestly misappropriated to his own use the shares and stock or that he has dishonestly used or disposed of the shares and stock in violation of a direction of law prescribing the mode in which the trust is to be discharged, and also in violation of a legal contract of service which he has made touching the discharge of that trust.
>
> The second accused holds a triple role in Tinju Dunia as its Chairman and Managing Director as well as a shareholder, and when therefore he pledged the shares and stock of the Bank with FNCB it can be reasonably held that in doing so he misappropriated the property of the Bank to his own use. *With regard to using or disposing of the shares and stock in violation of a direction of law or his contract of service or both, it is evident from a consideration of the Ordinance, Rules and By-laws, particularly in the light of the fact that this was a matter for the Board of the Bank to decide, if at all, the approval of the Registrar of Co-operative Societies had not been obtained and the transaction in question was outside the objects of the Bank in By-law 5, and also considering the evidence of the directors to the effect that no power to pledge the shares and stock had ever been delegated to all or any of the three accused, that the second accused was therefore clearly in effecting the pledge acting in violation of a direction of law and his contract of service, and what was in fact done in this case would, in my view, amount to a device for using the Bank's property for the benefit of Tinju Dunia in which the first and second accused were interested respectively as Adviser and as Chairman, Managing Director and shareholder.* There was as a result a wrongful gain to Tinju Dunia and a wrongful loss to the bank. I have already disposed of the argument raised regarding the effect of By-law 55 on the powers of the second accused as managing director of the bank. (Emphasis added.)

[822] The prosecution also correctly highlighted that the High Court in that case held that the Co-Operative Societies Ordinance 1948, the Co-Operative Societies Rules 1949 and the by-laws of the bank are considered as 'direction of law'. This decision was affirmed by the former Federal Court in *Datuk Haji Harun bin Haji Idris & Ors v Public Prosecutor* [1978] 1 MLJ 240 which ruled that the prosecution only has to prove that the accused had dishonestly misappropriated the property entrusted to him in violation of the direction of law which in that case was by-law 5 of the bank.

[823] That much on the position in law is clear. The prosecution further submitted, again correctly, that as the accused in this case is a shadow director of SRC (and in my finding also one who came within the definition of a director under s 402A of the Penal Code) by virtue of him issuing instructions and directions which the directors of SRC were accustomed to act or issue, he is as found earlier in this judgment, subjected to the same duties and liabilities as any other director of SRC. This would include the duties of a director under

A the Companies Act 1965 (applicable at the material time stated in the charges against him).

[824] The prosecution then pointed to s 132 of the Companies Act 1965 which reads as follows:

B

> 132 As to the duty and liability of officers
>
> (1) A director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office.
>
> (2) ...
>
> C
>
> (3) An officer or agent or officer of the Stock Exchange who commits a breach of this section shall be —
>
> (a) liable to the company for any profit made by him or for any damage suffered by the company as a result of the breach; and
>
> D
>
> (b) be guilty of an offence against this Act.
>
> Penalty: Imprisonment for five years or thirty thousand ringgit.

[825] It is to my understanding that it is now the contention of the E prosecution that as the accused was a director under the Penal Code, subjected to the duties and responsibilities of a director including the duties, responsibilities and liabilities under s 132(1) and (3) of the Companies Act 1965, and as evidence shows that the accused had control over the board of directors of SRC which led to the disposal of the RM42m over which he was F entrusted with dominion, the accused had therefore committed CBT in the manner of being in violation of a direction of law as contained in s 132(1) and (3) of the Companies Act 1965.

[826] This is where I however disagree with the prosecution. I do not think G what can be considered as a general albeit overriding duty of company directors to act honestly and with reasonable diligence in the discharge of their duties can be categorised as 'a direction of law' for the purposes of s 405 of the Penal Code. It is after all similar to the general fiduciary duty of directors under common law.

H

[827] The reason for my view is what I earlier highlighted which is the prosecution's own submission that there must be a specific degree for the direction of law, where it should not be construed in an expansive manner to even extend to a general direction to act honestly.

I

[828] It bears emphasis that the relevant words in s 405 of the Penal Code state the violation in respect of 'direction of law prescribing the mode in which such trust is to be discharged'. There must be some specific legal obligations governing the use of the entrusted property. The pertinent direction in law

must prescribe the manner in which the trust is to be discharged.

[829] The reliance on the alleged breach on the part of the accused of the statutory duty of company directors to act honestly as a basis for violation of a direction of law in the three CBT charges against him is unsustainable because s 132 of the Companies Act 1965 on the duty to act honestly does not at the same time specify the manner in which the trust is to be discharged.

[830] In the Singapore case of *Cheam Tat Pang & Anor v Public Prosecutor* [1996] 1 SLR 541; [1996] 1 SLR (R) 161 the High Court held that the words 'prescribing the mode' in s 405 of the country's Penal Code (identical to s 405 of the Malaysian Penal Code) require more than a general exhortation on the part of company directors to act honestly as contained in s 157 of the Singaporean Companies Act (similar to s 132 of the Malaysian Companies Act 1965). The High Court also stated that an accused person would be seriously prejudiced if an infringement of s 157 put him at risk of a conviction for CBT. The charge of conspiracy to commit CBT in that case failed.

[831] Similarly in *Hj Maamor bin Hj Abdul Manap v Public Prosecutor* [2002] 6 MLJ 668; [2003] 1 CLJ 370, where a company director was charged with two counts of CBT under s 409 of the Penal Code for disbursing the company's funds as loans to purchase shares in the company, the High Court in Kuala Lumpur when dealing with the question whether s 132(1) of the Companies Act 1965 could qualify as a direction of law under s 405 of the Penal Code followed *Cheam Tat Pang & Anor v Public Prosecutor* and held clearly, in the judgment of Augustine Paul J (as he then was) as follows:

> ... As to whether the conduct of the accused amounts to a violation of any direction of law the only relevant provision of law seems to be s 132(1) of the Companies Act 1965 ('s 132(1)') which reads as follows:
>
> > A director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office.
>
> In *Cheam Tat Pang & Anor v Public Prosecutor* [1996] 1 SLR 541 it was held that the word 'mode' in the third limb in s 405 connotes that there must be a degree of specificity in the direction of law in question. As Yong Pung How CJ added at p 548:
>
> > It should not be construed so expansively as to extend to a general direction to 'act honestly'. On this analysis, there was clearly serious difficulty with the respondent's reliance on s 157(1) (our s 132(1)) in the present case. This section mirrors a director's general fiduciary duty at common law'.
>
> Section 132(1) cannot therefore be construed as a 'direction of law' for the purpose of the third limb of s 405 ...

[832] As such, in my judgment, the prosecution's case that the accused had also committed CBT by dishonestly disposing the entrusted funds of SRC by violating a direction of law contained in s 132(1) of the Companies Act 1965 said to have prescribed the mode in which the trust should be discharged cannot be sustained and must fail.

Fourth ingredient of CBT — Whether there is dishonest intention

[833] Given that the prosecution has proved the presence of the accused as an agent of SRC and that he had misappropriated and converted to his use the entrusted property over which he had dominion, being the SRC's RM42m, the one other key element that must be established against the accused for an offence of CBT under s 409 of the Penal Code is the mental or fault element of the accused, which, as I have mentioned earlier is 'dishonesty'.

Presumption of dishonesty

[834] However in Malaysia, once the criminal act of CBT, by way of any of the three modes as stated, has been proved, the accused is presumed to have been dishonest until the contrary is proved.

[835] Section 409B of the Penal Code reads as follows:

> 409B Presumption
>
> (1) Where in any proceeding it is proved —
>
> (a) for any offence prescribed in sections 403 and 404, that any person had misappropriated any property; or
>
> (b) for any offence prescribed in sections 405, 406, 407, 408 and 409, that any person entrusted with property or with dominion over property had —
>
> (i) misappropriated that property;
>
> (ii) used or disposed of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged or of any legal contract, express or implied which he had made touching the discharge of such trust; or
>
> (iii) suffered any person to do any of the acts described in subparagraph (1) or (ii) above,
>
> it shall be presumed that he had acted dishonestly until the contrary is proved.

[836] The case of the prosecution as stated in its written submissions is that the accused had actual knowledge of the SRC monies being deposited into his

personal bank accounts, such that the accused's dishonest intention has been established by direct evidence. At the same time, the prosecution also relies on this presumption of dishonesty in s 409B(1) of the Penal Code. In the case referred to earlier, which is the decision of the Court of Appeal in *Public Prosecutor v Cho Sing Koo & Anor* [2015] 4 MLJ 689; [2015] 4 CLJ 491 it was observed as follows:

> [15] Therefore by operation of s 409B(1)(b)(ii) of the Penal Code the respondents were presumed to have acted dishonestly when they caused payments to be made to the unauthorized individuals. The presumption can of course be rebutted by the prosecution's own evidence but there is none in this case. It behooves the respondents therefore to adduce evidence to rebut the presumption on a preponderance of probability and this can only be done if they were to enter their defence.

[837] Similarly in the earlier High Court decision in *Hj Maamor bin Hj Abdul Manap v Public Prosecutor* [2002] 6 MLJ 668 it was already held that before the presumption contained in s 409B can be activated the prosecution must first prove that the accused had misappropriated the sums of money involved.

[838] The presumption in this case has thus been activated given proof of the commission of the three forms of CBT within the scheme of s 405 of the Penal Code. In that they had been perpetrated with dishonesty. And it is for the accused now to disprove dishonesty.

[839] Nevertheless the prosecution has also during the prosecution's case sought to establish this element of dishonesty on the part of the accused, independently of the presumption.

Reliance on evidence to establish the element of dishonest intention

[840] In my evaluation of the evidence, I find that the prosecution has, notwithstanding the presumption, successfully proved dishonest intention on the part of the accused when he performed the two forms of CBT, such that he had dishonestly misappropriated and dishonestly converted to his own use the entrusted property being the RM42m which belonged to SRC.

Meaning of dishonesty

[841] But first, the meaning of dishonesty. The terminology 'dishonestly' is defined in the s 24 of Penal Code as follows:

> 24 'Dishonestly'

A Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, irrespective of whether the act causes actual wrongful loss or gain, is said to do that thing 'dishonestly'.

Explanation — In relation to the offence of criminal misappropriation or criminal breach of trust it is immaterial whether there was an intention to defraud or to deceive any person.

[842] As *Ratanlal & Dhirajlal's Law of Crimes* (24th Ed Vol 2) states (p 1980):

Dishonest intention is the gist of the offence. Any breach of trust is not an offence. It may be intentional without being dishonest or it may appear dishonest without being really so.

[843] The question to be determined therefore is whether the accused intended to cause 'wrongful gain' or 'wrongful loss' vis a vis the misappropriation (or the conversion) of the property over which he was entrusted with dominion. The Penal Code also defines these terms, in s 23, which reads as follows:

23 'Wrongful gain' and 'wrongful loss'

'Wrongful gain' is gain by unlawful means of property to which the person gaining is not legally entitled.

'Wrongful loss' is loss by unlawful means of property to which the person losing it is legally entitled.

Explanation — A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully. A person is said to lose wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property.

[844] An easily understood explanation of what wrongful gain and loss means is usefully stated in the Singapore High Court in *Ang Teck Hwa v Public Prosecutor* [1987] 1 SLR 452; [1987] SLR (R) 513, as follows:

To intend a wrongful gain or loss requires that one knows the gain or loss is wrongful. Thus, if the appellant made use of the (money) for his own purposes knowing that he was not entitled to do so, then he would be doing so with the intention of causing wrongful gain to himself and wrongful loss to (the victim). Conversely, if the appellant can show that he did so honestly believing that he was legally entitled to do (it), then he could not be said to have acted dishonestly.

[845] Dishonesty requires proof of intention. Carelessness or negligence will not be able to convict an accused for a CBT offence. Regard will be had to all surrounding circumstances, including the nature and duration of the conduct of an accused. *Ang Teck Hwa v Public Prosecutor* nevertheless holds that the use

of funds by an accused who knows he was not entitled to do so manifests dishonest intention.

[846] This was made clear in the decision of the High Court in *Sathiadas v Public Prosecutor* [1970] 2 MLJ 241 which was decided before the amendment in 1993 which reversed the onus on the mental element of dishonesty to the accused, but which following observations by Raja Azlan Shah J (as HRH then was) are still pertinent:

> The gist of the offence of criminal breach of trust is entrustment and dishonest misappropriation or conversion to own use. Once the prosecution have succeeded in proving the receipt of the money for a particular purpose the case of entrustment is made out. Dishonest misappropriation or conversion to own use involves wrongful gain to the appellant or wrongful loss to his employers for the period of the retention of the money. *That must depend on the facts and circumstances of each case. Criminal breach of trust is not an offence which counts as one of its factors, the loss that is the consequence of the act, it is the act itself, which in law, amounts to an offence. The offence is complete when there is dishonest misappropriation or conversion to one's own use, or when there is dishonest user in violation of a direction, express or implied, relating to the mode in which the trust is to be discharged.*
>
> It may be observed that mere retention of money would not necessarily raise a presumption of dishonest intention but it is a step in that direction. *The fact that money entrusted to be used for a particular purpose, was not used for such purpose; that there was retention for a sufficiently long time would, together with other facts and circumstances justify the inference that the appellant had dishonestly misappropriated or converted the money to his own use.* There was the intention in the appellant to deprive his employers of their monies, and the appellant misappropriated the monies for a time, intending to make it good eventually when any further retention became impossible. (Emphasis added.)

[847] Examples from case law authorities show that dishonesty has been inferred where the entrusted property had been hidden in a dilapidated and unoccupied hut (see *Tong Keng Wah v Public Prosecutor* [1979] 2 MLJ 152; [1977–1978] SLR (R) 578), but gross carelessness would not amount to dishonesty for a public servant who failed to account for certain expenditures if the accused had little accounting experience and had to rely heavily on his clerk (see *Public Prosecutor v Mohamed bin Abdul Jabbar* [1948–1949] Supp MLJ 74). However, an airline clerk who failed to make entries and remit monies was convicted, where evidence of the length of time and number of occasions led to the finding of dishonesty (see *Sathiadas v Public Prosecutor*). It was also held in *Periasamy s/o Sinnappan & Anor v Public Prosecutor* that it will be easier to infer dishonesty where there has been conversion, and not just appropriation).

[848] And the Court of Appeal, in the judgment of Gopal Sri Ram JCA (as he then was) in *Periasamy s/o Sinnappan & Anor v Public Prosecutor* [1996] 2 MLJ 557 clarified on the concept of dishonest intention by reference to a passage

from a leading text authored by a distinguished Indian jurist, Sir Hari Singh Gour, in the following terms:

> It is elementary law; and the appellate judge has recognized this elsewhere in his judgment; that the offence of criminal breach of trust is not an offence of strict liability. It is only an offence, under s 405 of the Penal Code, to convert, dispose or to appropriate property if it is done with a dishonest intention. To emphasize this most important ingredient which forms the mens rea of the offence, we need do no more than to quote from Sir Hari Singh Gour's *Penal Law of India* (10th Ed) Vol 4 at p 3503 which reads as follows:
>
> > The mere violation of law or a legal contract is, however, only one element for consideration. The essential element is dishonesty. The term 'dishonestly' has been defined before, and it has frequently been the subject of discussion. It has been used here in the same sense as in ss 378 and 403 as implying the intention of causing gain or loss by unlawful means of property to which a person gaining or losing is not or is entitled.

[849] Indeed, in *Sathiadas v Public Prosecutor,* Raja Azlan Shah J (as HRH then was) stated that an offence of CBT is completed once it is established that monies had been entrusted for a particular purpose but was not used for that purpose, and a failure to explain or the inability to account for the said monies or acts would prove one's dishonest intent. The law does not require the prosecution to eliminate all possible defences or circumstances which might exonerate the accused.

[850] This was how this statement of law was in *Sathiadas v Public Prosecutor* articulated with trademark lucidity:

> It is settled law that mere failure of the appellant to account for the monies entrusted to him on the dates specified in the three charges might not be a foundation of his conviction in all cases but where he was unable to account and render an explanation for his failure, which was not true, an inference of misappropriation with dishonest intent might readily be made. ...
>
> *For the purpose of establishing dishonest intention, it is not the law in this country, any more than it is the law in India, that the prosecution should go further and also prove the actual mode of misappropriation or conversion. Once the prosecution have proved that the appellant was entrusted with money for a specific purpose and that he has failed to account for it or has done something which is clearly indicative of his dishonest intention, the charge of dishonest misappropriation must be held to have been established unless the appellant shows the existence of some fact or circumstance within his own knowledge which is consistent with his own innocence. It must be stated here that for the purpose of establishing dishonest intention the prosecution is not required to eliminate all possible defences and circumstances which might exonerate the appellant, or that apart from proving the appellant's possession of the money and his inability to account for it, it has also to prove the exact manner of his disposal of the money in a manner contrary to the purpose for which he received it.* (Emphasis added.)

[851] In the Indian case of *Harakrishna Mahtab v Emperor* AIR 1930 Pat 209, which was referred to with approval in *Navaratnam v Public Prosecutor* [1973] 1 MLJ 154, the Federal Court ruled that establishment of dishonest intention is not a matter of direct proof but inference from facts. Of significance is the finding that an inference of dishonesty could be validly made against an accused when he failed to account for the money proved to have been received by him, or when he gave a false account as to its use.

[852] Justice Fazl Ali in *Harakrishna Mahtab v Emperor* stated thus:

> With all respect I must point out that the essential thing to be proved in case of criminal breach of trust is whether the accused was actuated by dishonest indention or not. As the question of intention is not a matter of direct proof, the Courts have from time to time laid down certain broad tests which would generally afford useful guidance in deciding whether in a particular case the accused had or had not mens rea for the crime. Soin cases of criminal breach of trust the failure to account for the money proved to have been received by the accused or giving a false account as be its use is generally considered to be a strong circumstance against the accused.

[853] This is further reinforced by the decision of the Indian Supreme Court in the case of *Jaikrishnadas Manohardas Desai v The State of Bombay* AIR 1960 SC 889 which arrived much to the same effect, at the same conclusion, in the following words:

> ... to establish a charge of criminal breach of trust, the prosecution is not obliged to prove the precise mode of conversion, misappropriation or misapplication by the accused of the property entrusted to him or over which he has dominion. The principal ingredient of the offence being dishonest misappropriation or conversion which may not ordinarily be a matter of direct proof, entrustment of property and failure in breach of an obligation to account for the property entrusted, if proved, may in the light of other circumstances, justifiably lead to an inference of dishonest misappropriation or conversion. *Conviction of a person for the offence of criminal breach of trust may not, in all cases, be founded by merely on his failure to account for the property entrusted to him, or over which he has dominion, even when a duty to account is imposed upon him, but where he is unable to account or renders an explanation for his failure to account which is untrue, an inference of misappropriation with dishonest intent may readily be made.* (Emphasis added.)

[854] This position in law is also consistent with the pronouncements in leading case-law authorities in Malaysia on CBT and dishonesty such as *Periasamy s/o Sinnappan & Anor v Public Prosecutor* and *Sathiadas v Public Prosecutor*, both of which have been referred to earlier.

[855] As such, on the issue of whether there was dishonest misappropriation, under s 24 of the Penal Code, for the act of misappropriation to be dishonest the intention of the act must be to cause wrongful loss or wrongful gain

regardless of whether actual loss or gain was caused by the act. As mentioned, under s 23, a wrongful gain is gain by unlawful means of property to which the person gaining is not legally entitled. And wrongful loss is the loss by unlawful means of property to which the person losing it is legally entitled.

Evidence of dishonest intention

[856] What then of the position in the instant case. Has the prosecution shown dishonest intention? The short answer is in the affirmative. On the totality of the evidence presented at trial, and applying the principles distilled from the various case law authorities on CBT, I find that at the end of the prosecution stage, the prosecution has shown that the accused had committed the acts with the intention of causing wrongful gain to himself or wrongful loss to another person, in this case SRC, within the ambit of the definition of 'dishonesty' under s 24 of the Penal Code.

[857] In my judgment, direct evidence and inference of knowledge and dishonest intention on the part of the accused of the RM42m from SRC which flowed into his personal accounts has been established and may be stated hereunder.

Direct evidence of admission of knowledge

[858] Without having to rely on any inference, there is actually a clear and direct evidence in the form of an affidavit which was affirmed by the accused himself that he admitted that the RM42m which had been transferred into his accounts was funds which belonged to SRC. In his sworn affidavit (P616A), which the accused affirmed on 23 February 2016 (more than three years ago) the accused unmistakably confirmed his knowledge that the RM42m was from SRC, except that he affirmed that he did not know that it had been transferred through the two intermediaries, namely GMSB and IPSB.

[859] Exhibit P616A is part of the pleadings filed on behalf of the accused and is his own affidavit in the civil defamation suit (23NCVC-79–10 of 2015), which the accused instituted against a former Cabinet minister, Tun Ling Liong Sik ('Tun Ling') where Tun Ling had allegedly uttered words to the effect that the accused had stolen money from 1MDB. These documents were tendered through Ranjit Singh (PW55), a senior legal practitioner who represented Tun Ling in that suit.

[860] First, in the main suit, in response to Tun Ling's statement of defence and counterclaim, a reply was filed on behalf of the accused (P611A). And crucially, in para 20.5 therein, it was pleaded thus:

> Paragraph 33.3(ii) is admitted to the extent of the deposited funds amounting to RM42 million into the account of the Plaintiff through Am-Private Banking. However, the Plaintiff at all material times has no knowledge that it was channeled through two intermediaries as alleged by the Defendants.

[861] The amended reply (P633A) too replicates para 20.5 in identical terms. Patently, the accused here (in P611A and P633A) is focused on denying knowledge that the funds was channeled through GMSB and IPSB. But he admitted RM42m did enter his accounts.

[862] The accused then also filed an application to strike out the defence of qualified privilege used by Tun Ling in that civil suit. In that application, in reply to Tun Ling's averments, the accused affirmed on oath an affidavit (P616A) where he deposed at para 6:

> Paragraph 8 of the Defendant's Affidavit in Reply is admitted in so far as in my Reply and Defence to Counterclaim, I have admitted that the USD700 million did enter my account as a personal donation and the 42 million which originated from SRC entered my account without knowing that it was channelled via two (2) intermediaries. Paragraph 6 of the Plaintiff's Affidavit in Support is reiterated and adopted.

[863] I do not think what the accused affirmed in his own affidavit in P616A can be read other than what is plainly stated. Which is that the accused admitted the RM42m which originated from SRC had been credited into his accounts but that he did not know it was channeled through GMSB and IPSB. So the accused admitted his knowledge twice, in the reply (in P611A and P633A), and even more manifestly in the affidavit (P616A).

[864] I am not unmindful that when these were affirmed by the accused, which was in February 2016, the controversy on 1MDB and SRC, specifically about funds remitted into the personal accounts of the accused, had long been publicised (since July 2015) and by the end of January 2016, the attorney general at the time had also cleared the accused from any allegations of criminal conduct concerning 1MDB and SRC.

[865] I do not think however that the accused meant that at the time of affirmation of the affidavit, he already knew the funds came from SRC, but not earlier when the transaction was effected. This would have been such a critical piece of evidence in that suit that must have necessitated an accurate drafting of the affidavit (and reply) consistent with the legal position taken by the accused then. In any event, the defence too did not raise this in the cross-examination of PW55 or in its submissions at the end of the prosecution case.

A **[866]** In addition, this possible argument that the accused was asserting what he knew at the time of affirming the affidavit in February 2016 (and not at the material time specified in the charges) does not hold water because by then he would have also known that the funds came though the two intermediaries, GMSB and IPSB. As will be shown shortly, PW37 and PW49 had apprised B him of the transactions (on the pretext that he did not already know) in July 2015 and the press conference by the attorney general on 26 January 2016 too had detailed out the money trail of the RM42m from SRC which entered into the accused's Account 880 and 906.

C

The accused's own instruction to Am-Islamic Bank to transfer RM27m to PBSB and PPC on 29 December 2014 (P277)

[867] A particularly strong and direct evidence of the accused's knowledge of D not only the operations of his accounts (as to be expected of any accountholder) but also the movements of funds from SRC including that which led to the crediting of his personal accounts is the accused's own direct involvement in the giving of the instruction dated 24 December 2014 (P277) which he signed off on to Am-Islamic Bank to effect the transfer on 29 December 2014 of a total of E RM32m from his Accounts 880 and 906.

[868] This instruction could not have been given by a non-account holder as the mandate to Nik Faisal did not permit him to effect the transfer of funds other than to any one of the accused's accounts only. As I have mentioned, F PBSB and PPC had earlier in July and September 2014 transferred a total of RM32m into two personal accounts of the accused (specifically RM27m into Account 880 and RM5m into Account 906). This RM32m was, as evidence has shown earlier, swiftly utilised by the accused.

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[869] I have also stated that evidence further demonstrates that upon the transfer of RM27m and RM5m from IPSB on 26 December 2014 into Accounts 880 and 906 respectively, only three days later on 29 December 2014, the exact amounts of RM27m was debited out of Account 880 and H credited into the account of PBSB and RM5m debited out of Account 906 and credited into the account of PPC. These transfers to PBSB and PPC from these two accounts of the accused were executed by Am-Islamic Bank based on the instruction signed by the accused himself (P277), as highlighted earlier in this judgment.

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[870] Of considerable importance is the detailed work done in the background in the planning of the movement of funds from SRC to the accused's two accounts through GMSB and IPSB. The purpose of the transfer of the SRC's RM32m from IPSB to the accused was clearly to enable him to

transfer and pay back the RM32m extended by PBSB and PPC to him earlier (and as has also been shown, also fully utilised by him) back to PBSB and PPC.

[871] To give a fuller picture on this issue, it is worthy of emphasis that based on the testimony of Ung Su Ling (PW49), which is generally consistent with that of Datuk Dr Shamsul (PW37) and Joanna Yu (PW54), that sometime in December 2014, the late Datuk Azlin, the principal private secretary of the accused had contacted PW49 and informed her that certain funds had been transferred into IPSB's account. PW49 was told by Datuk Azlin to inform PW37 to execute two separate transfers of RM27m and RM5m into two accounts, details of which were provided by him other than the identity of the accountholder.

[872] On 23 December 2014, PW49 contacted PW54 via Blackberry Messenger ('BBM') (P578) to confirm the accuracy of the account details as they were coded and had very similar account names — *AmPrivate Banking — 1MY* for Account 880 and *AmPrivate Banking — MY* for Account 906 (without identifying the owner). Upon such confirmation, PW49 then contacted PW37 and directed him to transfer the funds based on the details which she provided to him via email (P480) which stated the details of both accounts. On 26 December 2014, PW49 contacted PW54 via BBM to inform the latter that the transfers of RM27m and RM5m would be executed that day (P578–15).

[873] And indeed the sums were credited to Accounts 880 and 906 on that 26 December 2014. As everything fell into place, conveniently, the accused's letter dated 24 December 2014 (P277) directing Am-Islamic Bank that RM32m which came from IPSB, then standing to his credit (RM27m in Account 880 and RM5m in Account 906), be transferred to PBSB and PPC respectively, becomes nothing but a clear evidence that he must have had knowledge that the movements of the incoming RM32m which had been transferred from SRC through GMSB and IPSB into his two personal accounts. Without the RM32m from SRC, and given the balances in his two accounts, the accused could not have instructed the transfer of RM32m from his accounts to PBSB and PPC.

[874] The balance in Account 880 on 26 December 2014 before the entry of RM27m from IPSB was only RM848,242.89. Just before the entry of the RM27m on that 26 December 2014, a transfer was made from Account 880 to Account 906 of RM6m. This resulted in the balance in Account 880 to fall below RM1m. The arrival of RM6m into Account 906 immediately regularised an overdrawn position of about RM142 thousand such that the balance just before the entry of RM5m from IPSB in that Account 906 stood

at approximately RM5.8m. For completeness, the balance in Account 898 during the same time was only about RM123 thousand.

Movements of funds arranged to avoid detection and involvement of Nik Faisal and Datuk Azlin

[875] The manner in which the RM42m was arranged to be transferred to the personal accounts of the accused which was through the use of two intermediary companies, GMSB and IPSB is a valid basis for an inference of dishonesty to be raised. This is because there is no reason or requirement why the funds should be made to flow through the accounts of GMSB and IPSB from being deposited into the accounts of the accused other than to make the source of the funds less apparent or to avoid detection altogether. There is no suggestion during cross-examination of the relevant witnesses by the defence that the use of intermediaries was to comply with any legal requirements or in any fashion commercially beneficial. None whatsoever.

[876] More tellingly, the use of these intermediaries was only for a very short period. As I have discussed earlier, in the case of GMSB, the first RM40m from SRC was received on 24 December 2014 and on that same day the same RM40m was transferred out to IPSB. IPSB in turn two days later on 26 December 2014 transferred, out of the RM40m, RM27m into the Account 880 of the accused (the subject of the first CBT charge) and RM5m into Account 906 (the subject of the second CBT charge).

[877] Similarly, RM5m each was transferred out of SRC to GMSB on 5 and 6 February 2015 respectively. From GMSB, the RM10m was transferred to IPSB on the same days of the credit into IPSB, on 5 February 2015 and 6 February 2015, of RM5m respectively. And IPSB on 10 February 2015 transferred the entire RM10m to the accused's Account 880 (subject to the third CBT charge). The modus operandi for the transfers to the accused by way of the movements of funds through other accounts by layering, in the absence of any explanation, strongly suggests the attempt to avoid detection.The evidence linking such movements of the funds to the accused is no less forthcoming.

[878] First the beneficiary of these transfers is the accused himself. Accounts 880 and 906 belonged to him and only he could spend money out of these accounts, which he in fact did as has been shown by evidence.

[879] Secondly, the movements of funds from SRC to GBSB and from GMSB to IPSB in respect of the funds totalling the RM42m (relevant to the three CBT charges) was arranged by Nik Faisal, who as stated earlier as the CEO and director of SRC was the SRC directors' link person with the accused who then

was the Prime Minister with the power to hire and fire the directors of SRC, and the authority to approve any amendments to its M&A, also as the sole shareholder, MOF Inc as represented by the Finance Minister, as well as later as the company's advisor emeritus. Crucially, Nik Faisal throughout the material period had also performed the role as the mandate holder for the accused's personal accounts in question.

[880] Thirdly, as for the transfers from IPSB into the two personal accounts of the accused in the aggregate sum of RM42m (subject to the three CBT charges), the evidence given by the CEO of YR1M (PW49) was that in preparation for all the transfers, her instructions to the MD of IPSB (PW37) on the same was in turn merely following the directions given to her (PW49) by the late Datuk Azlin, the principal private secretary of the accused then.

[881] The late principal private secretary of the accused was also the one who provided to PW49 the details on the transferee accounts, without disclosing the identity of the account holders on all such movements from IPSB to the personal accounts of the accused. PW49 had also confirmed the account details with Joanna Yu (PW54) the relationship manager who oversaw such accounts without being told the identity of the owner of these accounts.

[882] I should also add, at the risk of repetition, that the late principal private secretary was a member of the board of trustee of YR1M of which the accused chaired and PW49 was the foundation's CEO.

[883] The manner the transactions on the transfers were arranged and particularly the individuals who featured prominently in making them happen — Nik Faisal and Datuk Azlin give rise to the inference of knowledge on the part of the accused. I need only mention paragraph n of the defence statement of the accused which was furnished to the prosecution before trial in compliance with s 62 of the MACC Act, as follows:

> The management and supervision over AmIslamic Bank Berhad Account No 2112022009694, AmIslamic Bank Berhad Account No 2112022011880, AmIslamic Bank Berhad Account No 2112022011906, and AmIslamic Bank Berhad Account No 2112022011898 had been reasonably delegated to Nik Faisal Ariff Kamil and Datuk Seri Azlin Alias due to necessity and in bona fide fashion.

Communication between Jho Low and PW54 which shows knowledge of accused

[884] The evidence in the BBM transcripts (in exhs P578 and D650) between Joanna Yu (PW54) and Jho Low is another basis on which, despite the denial

by the defence, knowledge of the accused on the status of his accounts and the remittance of funds from SRC mayfurther be reasonably inferred, as supported by the relevant statement of accounts.

Application for disclosure of BBM communication of Joanna Yu (PW54)

[885] I should add that the evidence on the BBM messages (P578) arises from an oral application by the defence under s 51 of the CPC for all transcripts of communication between PW54 and her subordinates on the one part and Jho Low and those associated with him on the other part which relate to the operations of the accused's personal accounts. The prosecution objected to this application.

[886] After hearing short submissions from both sides I ruled in favour of the accused, holding that the contents of such communication (between those at private banking, Am-Investment Bank who helped manage the personal accounts of the accused on the one part and those such as Nik Faisal and Jho Low who allegedly gave instructions to the bank for such purpose, on the other part) would be relevant to the defence of the knowledge on the part of the accused of the movements of funds and operations of his own accounts. Such evidence would be necessary and desirable for the purposes of this trial.

[887] These BBM transcripts tendered through and confirmed by Joanna Yu (PW54) include records of Jho Low asking PW54 about the balance of the relevant personal accounts in anticipation of imminent writing of specific cheques by the accused. Another specific example would be the request by the accused conveyed on 23 December 2014 by Jho Low to AmBank to facilitate clearance of his credit card purchases in Honolulu. Another was the request by the accused for AmBank VISA clearance for purchases in Italy in August 2014.

[888] The many BBM chats (P578 and D650) between Joanna Yu (PW54) and Jho Low thus even show actual knowledge on the part of the accused concerning the status and transactions involving his personal accounts. This is because these BBM conversations exhibit situations where Jho Low on-sent messages he received from the accused to PW54, or where Jho Low sent copies of messages that he delivered to the accused on the account balances (after making the enquiry with the bank). There are also situations where Jho Low informed PW54 of cheques that the accused may be writing, on incoming remittances into the accused's accounts, as well as on proposed transfers by the accused. And there are also situations where Jho Low contacted PW54 upon receiving instructions from the accused.

Specific examples of communication

[889] As confirmed in the testimony of PW54 who was referred to extensively to the BBM evidence (P578) in cross-examination, evidence in the form of extracts from the BBM communication in P578 between P54 and Jho Low which shows knowledge of the accused include as follows:

(1) Tab 9 (BBM with Jho Low) — p 18 of 43 dated 8 July 2014 at 14:45

J: Eagle 27... RM27m ... donation ... don't ask identity ... pls confirm receipt ... NOT from PPC ... from Permai ... sent on behalf of HRH — donation

Joanna: 'The incoming is myr?'

J: Yes MYR ... Let me know once received and new updated balance ... pls chk so I can inform mnr ...

Let me know when in?

MNR going to write cheques

[890] Given the date of conversation, which was on 8 July 2014 and the reference to RM27m, this must be the RM27m credited on 8 July 2014 into the accused's Account 880 as mentioned earlier, where the transferor is PBSB. This is also confirmed by the communication to such effect that it came from PBSB, not PPC. The allusion to HRH was probably meant to refer to the alleged donation from Arab royalty, as a key defence of the accused is that he thought the SRC funds were part of the donation from Arab royalty, which he had been receiving since 2011, and was largely also premised on the four letters (D601–D604) from Arab parties, with copies given to AmBank and BNM, the Central Bank.

[891] The BBM chat also shows that Jho Low would want to be notified once the RM27m was received so that he could inform the accused. This suggests Jho Low was also involved in the operations of the accounts of the accused. This is further fortified by his statement that he knew that the accused would be writing cheques.

[892] And the statement of account for Account 906 (P110) records that the accused had in fact issued the following cheques after the conversation date of 8 July 2014:

Transaction Date	Cheque No	Amount
16 July 2014	000387	RM 30,000.00
16 July 2014	000390	RM 50,000.00
18 July 2014	000391	RM 100,000.00
18 July 2014	000393	RM 25,000.00
18 July 2014	000394	RM 5,000,000.00
22 July 2014	000388	RM 1,000,000.00

22 July 2014	000392	RM 91,000.00
22 July 2014	000389	RM 170,000.00
22 July 2014	000395	RM 1,500,000.00
24 July 2014	000396	RM 1,000,000.00
25 July 2014	000397	RM 91,470.00

(2) Tab 9 (BBM with Jho Low) — p 21 of 43 (21 August 2014)

J: Need to issue another cheque for 5m to UMNO. Ok to do it? — please arrange enough funds.

Joanna: Ok.

[893] This message shows that Jho Low was involved in the issuance of cheques by the accused, at least in so far as dealing with bank to ensure availability of funds. For PW54 to reply 'OK' is somewhat odd because it is not usually the responsibility of banks to ensure that the account holder has enough funds to write cheques out of the account.

[894] But this could suggest that PW54 was by then already familiar with the arrangement to ensure availability of funds by individuals like Nik Faisal to effect inter-account transfers or procure cash deposits over the counter. Regardless, the statement for Account 906 (P110) does show that the accused did in fact issue a cheque of RM5m on 21 August 2014, on the same day as the message.

(3) Tab 9 (BBM with Jho Low) — pp 42–43 of 43 (20 November 2014) 19:43

J: What r the balances in each of the 3 accounts for MNR ... He needs to write a RM10m cheque

[895] Again Jho Low shows his involvement in the management of the three personal accounts of the accused. This time he wanted to find out from Joanna Yu (PW54) as to the balances in the three accounts, again given the intention of the accused to write another large sum, said to be for RM10m. True enough, the statement for Account 898 (P109) records that the accused did in fact issue a cheque for RM10m on 3 December 2014 (close to two weeks after the BBM chat).

(4) Tab 9 (BBM with Jho Low) — p 7 of 23 (23 December 2014, 14:10)

J (14:10): My platinum cards are not going through Jho. Can u call Ambank visa and mastercard right away? Thanks — from MNR pls help asap.

...

J: He is in Hawaii.

And wants to charge usd100k

PING!!!

Joanna: System ok wor

They asked to try again

They are on standby to clear transaction

...

J (14:43): Usd100k one transaction no problem?

Joanna: No prob. His limit RM3m I think.

J: Ok.

Joanna: Transaction cleared de.

J: Sure?

Joanna: Yes — cards centre called to confirm that the transaction cleared at their end.

[896] The first message is a forwarded one which originated from the accused and sent to Jho Low which the latter forwarded to PW54. The purpose, based on the rest of the conversation is to seek assistance from the bank to clear certain credit card purchases by the accused in Hawaii involving the sum of USD100,000. PW54, after checking, told Jho Low that the transaction went through. This BBM evidence again shows the accused dealt with Jho Low on matters concerning the operation of his personal accounts, including in respect of private purchases and even asked that Jho Low interact with the bank on such matters, despite Jho Low not being an authorised person to act on his behalf on his accounts.

[897] The Visa and Master Card credit card statements of the accused issued by AmBank/Am-Islamic Bank dated 8 January 2015 (P587) registers that the accused did utilise his credit cards as stated in his message that was forwarded by Jho Low to Joanna Yu (PW54) on the same date it was sent to PW54 for the following purchase:

Transaction Date	Transaction Description	Amount
22 December 2014	Chanel, Honolulu	USD 130,625.00/RM 466,330.11

(5) Tab 9 (BBM with Jho Low) p 18 of 23 (02/03/2015,12:53)

J: Btw what's *status* re mnr ac?

Balances?

Joanna: Let me check

J: Seeing PM tomorrow

[898] Again, this shows Jho Low was involved in the management of the personal accounts of the accused. This time he was asking PW54 at AmBank private banking for the balances on the accounts in preparation for his meeting with the accused the day after.

(6) Tab 6 (BBM with Jho Low) pp 7–8 of 10 (26 March 2014 09:06)

J (10:46): what r amts in the 3 accounts

J (12:10): Fyi – Dear YAB Dato' Sri

Est Local CSR Balances in AmBank:

1 MY – 2m (after the transfer today)

Y1MY – 8m (after today)

MY – 20m

Tracking it closely so when another 10m utilized.

Thank you.

[899] This shows a request by Jho Low to PW54, wanting to know the balances in the three personal accounts of the accused, showing yet again Jho Low's role in the management of the accounts. The later message from Jho Low to PW54 is a copy of a message that Jho Low sent to the accused after he obtained the requisite information. This suggests that Jho Low was required by the accused to make that account balances status update to the accused. 1MY, Y1MY and MY incontrovertibly refer to the three accounts of Accounts 880, 898 and 906, respectively. Jho Low himself stated that he was tracking the account balances. This is only to be expected if he was involved in the management of the accounts.

(7) Tab 6 (BBM with Jho Low) p 10 of 10 18 May 2014 15:26

J: Pls chk if ambank account is overdrawn ... Boss said he wrote a big cheque.

[900] This is another request from Jho Low for PW54 to check whether an account out of which the accused had written a cheque for a large sum was overdrawn. Again, it was Jho Low whom the accused asked to ensure that cheques he wrote would not be declined. And the statement for Account 906 (P110) shows that the accused did in fact issue a cheque for RM10m on 16 May 2014, two days before the message was sent to PW54.

(8) Tab 9 (BBM with Jho Low) — pp 19–21 of 43 9 August 2014

J (17:07): From M – Great holiday here. All went well. Need u to speak to Cheah to clear Ambank Visa for 1.2M Euro for u know what purchase. Can u do it immediately.

From PM

...

J (17:11): Let me know once you confirmed okay and informed ambank.

J (17:59): PING!!!

Joanna (18:17): Just managed to contact them. Cleared.

[901] This is another request to ensure the credit card purchases by the accused done in Italy were cleared. This is a message from the accused to Jho Low which Jho Low forwarded to PW54. Again, the accused sought Jho Low's help to ensure smooth clearance on his credit card purchases, not just in respect of the three current accounts.

[902] The accused's Visa and Master Card credit card statements dated 8 September 2014 (P587) show that credit card purchases of RM3,282,734.16 was made by the accused in Italy thus confirming yet again the truth of the message from the accused to Jho Low. The purchases were as follows:

Transaction Date	Transaction Description	Amount
8 Aug 2014	De Grisogono, Arzachena, Italy	Euro 100,000 / RM 440,928.71
8 Aug 2014	De Grisogono, Arzachena, Italy	Euro 3,500 / RM 15,432.50
8 Aug 2014	De Grisogono, Arzachena, Italy	Euro 100,000 / RM433,986.28
8 Aug 2014	De Grisogono, Arzachena, Italy	Euro 100,000 / RM 433,986.28
8 Aug 2014	De Grisogono, Arzachena, Italy	Euro 50,000 / RM 216,993.14
8 Aug 2014	De Grisogono, Arzachena, Italy	Euro 100,000 / RM 433,986.28
8 Aug 2014	De Grisogono, Arzachena, Italy	Euro 100,000 / RM 433,986.28
8 Aug 2014	De Grisogono, Arzachena, Italy	Euro 100,000 / RM 433,986.28
8 Aug 2014	De Grisogono, Arzachena, Italy	Euro 100,000 / RM 433,986.28
8 Aug 2014	De Grisogono, Arzachena, Italy	Euro 10,000 / RM 43,398.62

[903] And I have already earlier when analysing the evidence on the conversion of funds to the accused's use, specifically in the context of the utilisation by the accused of the RM27m sent by PBSB on 8 July 2014 to his Account 880 (later repaid on 29 December 2014 by the accused via his instruction in P277 from the RM27m which Account 880 subsequently

received on 26 December 2014 from IPSB) referred to the evidence of the payment by the accused for the these credit card purchases.

[904] It is thus worth repeating that by a letter dated 11 August 2014 addressed to Am-Islamic Bank (P275), Nik Faisal instructed that an exact sum of RM3,282,734.16 be debited from Account 880 to pay the accused's credit card accounts. The instruction made it clear that out of that sum, a sum of RM449,586.95 be transferred and credited to his Visa Platinum Credit Card account (No 458581800005496) and another higher amount of RM2,833,147.21 be credited and paid into the accused's MasterCard Platinum Credit Card account (No 5289438000038961).

[905] Again, as stated earlier, the relevant banking records substantiate these credit cards payments in the form of the thermal receipt dated 13 August 2014 (P276) for the debit of RM3,282,734.16 from Account 880, as well as the Visa Platinum Credit Card statement (P587) which showed a payment of RM449,586.95 made on 13 August 2014, and the MasterCard Platinum Credit Card statement (P587) which recorded a payment of RM2,833,147.21 also made on 13 August 2014.

[906] Yeoh Eng Leong (PW47), a senior vice president at AmBank's Credit Card Authorisation and Banking Fraud Management Department, confirmed the Visa Platinum Credit and MasterCard Platinum credit card statements (P587) to be accurate and that the bank had never received any inquiries or complaints of unauthorised or unlawful usages of the accused's Visa and Master Card credit cards.

[907] I should also refer to some other communication, not in the BBM (P578), but by way of text messages between Jho Low and PW54, and this was tendered at the request of the defence in exhs D642 and D643, as follows:

(a) D642 (chat with J — 1MY on 7 May 2011):

Jo: 0133318999

J – 1MY: With pm.

Will call wen done.

Jo: Ok. Thanks.

Need to clear a cheque — RM200k issued to Jacob Dungan Sagan.

J – 1MY: Okay.

Chking.

Can clear.

(b) D643 (chat FL — on 19 August 2011):

Jo: USD49,999,988 received @2.9750 = RM148, 749,984.30 TOTAL in Current Account with today's deposit = RM201,523,616.66

Jo: PING!!

FL: Okay. Thanks.

FL: Informed mnr

(c) D643 (chat FL — on 17 January 2012):

FL: Quick one, received usd10m x 2, usd50m, usd30m, usd70m – correct?

FL: Just wanted to double check.

FL: Need to report to mnr tonight

FL: PING!!!

Or was it more?

FL: PING!!!

The first round, usd10m x 2 or was it more?

Jo: It's correct.

[908] Again, these messages and their references to 'pm' and 'mnr' plainly show that Jho Low was involved in assisting the accused in managing the latter's accounts, which included Jho Low having to check with the bank on the deposits, clearance of cheques, as well as on the balances. Like the BBM messages (P578), similarly in these messages (D642 and D643), which PW54 confirmed in her testimony to have participated in (as well as stated that 'FL' in these messages was in reference to Jho Low), Jho Low is recorded as saying he was either with the accused, or checking with, having informed the accused or reported to him.

[909] Significantly too, these messages show the relevant period to be in the years 2011 and 2012 which was a number of years before the transactions subject to the three CBT charges took place. This shows the relationship between the accused and Jho Low at least vis a vis the management of the former's accounts had started very much earlier than the movements of funds in 2014 and 2015 which ended up in the personal accounts of the accused subject to the three CBT charges.

[910] The above BBM messages and the text messages (P578 as well as D642 and D643) are contemporaneous evidence that show that the account holder, namely the accused had tasked Jho Low assist him in the management of the transactions in his personal accounts, including to verify his bank accounts to

ensure that the accused had sufficient and available funds to pay for his credit card purchases and expenses and to pay for the cheques already issued by him or intended to be issued by him.

[911] The strong if not also an irresistible inference is that under such circumstances as demonstrated by this body of BBM and text messages evidence, the accused must surely have had actual knowledge of the status and of the countless transactions involved, and his bank balances, including those concerning SRC relevant to the seven charges which occurred in December 2014 and February 2015.

Utilisation of the RM42m by the accused

[912] The fact that the accused had utilised the RM42m from SRC is evidence from which inference of his knowledge of the source may certainly reasonably validly be drawn. The first RM32m was upon receipt by the accused in his Accounts 880 and 906 almost immediately transferred out to pay PBSB and PPC. Fifteen personal cheques were issued by the accused himself from Accounts 906 and 898, involving a total amount of about RM10.7m, all confirmed to be cleared and payment received by the payees.

[913] The key point is the utilisation by the accused of the RM42m was almost immediate. The inference is the accused had spent on the monies upon knowing that funds from SRC had entered his personal accounts. He issued the instructions (P277) on 24 December 2014 to transfer RM32m to PBSB and PPC and conveniently RM32m arrived from SRC two days later into his accounts to enable the transfers be made to PBSB and PPC on 29 December 2014. And the RM10m received on 10 February 2015 was immediately used to regularise his accounts, as well as to enable clearance of cheques already issued and allowed other cheques to be issued, as shown earlier.

Absence of any queries or complaints during the period

[914] Furthermore, that the accused never raised any queries, what more a complaint with Am-Islamic Bank with regard to the operations of his personal accounts opened and maintained at the bank is also confirmed by the relevant officers of the bank who handled his accounts. Not during the material period of the transactions or any time thereafter. Although they never had any direct and personal interaction with the accused, both Uma Devi Raghavan (PW21), the AmBank JRC branch manager, and Joanna Yu Ging Ping (PW54), the relationship manager at the bank's private banking department in charge of the accused's personal accounts testified that based on the records and as far as they were aware, the accused had never made any inquiries with the bank, let alone lodged any complaint about the numerous and large transactions in and out of

his three personal accounts, not to mention lodge any police report or filed any legal suits on any irregularities in his accounts.

[915] As stated earlier, Yeoh Eng Leong (PW47), a senior vice president at AmBank's credit card authorisation and banking fraud management department, who had testified to the accuracy of the accused's Visa Platinum Credit Card and the MasterCard Platinum Credit Card statements (P587) also confirmed that the bank had never received any inquiries or complaints of unauthorised or unlawful usages of the accused's Visa and Master Card credit cards. I have discussed the evidence in the credit card statements earlier, in relation to the utilisation of the RM27m transferred to Account 880 from PBSB on 8 July 2014, particularly on the purchases at Italy on 8 August 2014 made by the accused and the settlement of the charges arranged by Nik Faisal on those credit card accounts on 13 August 2014.

[916] Neither did the accused sue the bank for having effected any alleged unauthorised transactions, or for any alleged wrongful debiting of his accounts when the withdrawals took place. Nothing at all.

[917] I need in this context mention only the decision of the Court of Appeal in *Yoong Sze Fatt v Pengkalen Securities Sdn Bhd* [2010] 1 MLJ 85 where it was observed:

> [20] After having received the contract notes and contra statements from the plaintiff, the defendant had never protested nor queried the plaintiff thereon. There was also no complaint by the defendant that he had not allowed his employer to utilise the account. He was completely oblivious to the plaintiff's letter of demand. The defendant's conduct or absence of response speaks volumes against the defendant. The silence, indeed the omission, by the defendant in this regard is deafening.

[918] The inference must therefore be that the accused had seen nothing wrong with the operation of his personal accounts including the remittances of the RM42m from SRC which he utilised.

The accused's overarching control of SRC and his private interest therein

[919] In my view, the finding that the accused had a special and private interest in SRC under s 23(1) of the MACC Act given his position of overarching control in the company (and as the shadow director and director under a 402A of the Penal Code for CBT purposes) also justifies the drawing of the inference that he must have known about the outward transfers of funds from SRC that eventually was expended by the accused himself.

[920] As analysed earlier in the section on the abuse of office charge under s 23 of the MACC Act, regard must be had to the series of conduct and action undertaken by the accused in relation to the establishment of the SRC, its crucial financing from KWAP and the government guarantee processed by MOF as well as the change in the direct ownership of SRC, the appointment of directors, the issuance of various shareholder minutes, other directions conveyed through Nik Faisal, each carried with it the approval from the accused, which reflected in plain terms a company that is SRC being under the overarching control of the accused himself. These too give rise to the inference of knowledge on his part, on the presence of intention to cause either a wrongful loss to SRC or a wrongful gain to himself, or like what eventually transpired in this case, both wrongful loss and wrongful gain.

[921] It cannot be emphasised enough that the accused played a pivotal role in getting KWAP extend the RM4 billion financing to SRC despite it being a start-up entity with no track record, equally achieved by his influence in getting MOF processed the issuance of the two government guarantees. His overarching authority in SRC as enshrined in its M&A and exercisable as its sole shareholder through his directions and the issuance of shareholder minutes conveyed to the directors of SRC for execution is beyond question. The accused featured prominently in the introduction of article 117 creating the position of advisor emeritus that was also him. He gave approval as the Prime Minister for the M&A to be amended, and he gave the requisite approval as the sole shareholder in the relevant shareholder's minutes.

[922] He also approved the decision to place SRC under the purview of MKD Division giving him direct control of SRC as the MOF Inc. As the sole shareholder of SRC, he was now empowered to issue any directive to the directors of SRC. Yet there was no supervision and monitoring by MKD Division (BMKD). Not for lack of trying. I have shown, from the testimonies of the various MOF officials namely PW41, PW43, PW44, PW45, PW53 and PW56 that SRC refused to cooperate and this was not put right by the accused.

[923] Article 67 of SRC's M&A specifically prohibits any officer of MOF to be appointed to the board of directors, which is the norm for all other MKD owned companies. PW44's testimony that he was rushed to place SRC under MKD Division and that it was a 'top-down' decision, where he had to approve the decision already made by the accused. PW53's testimony highlighted that there was no supervision of SRC by MOF, even though MOF attempted to obtain information from SRC on its financial status without any real success.

[924] PW56's testimony was that he was told by the accused to stay away from matters related to 1MDB and SRC, even though PW56 was the only other person authorised by law to be involved in matters relating to MKD owned

companies by virtue of his position as the Minister of Finance II at the material time. This is further evidence yet of the accused wishing to have control, to the exclusion of anyone else and appears to have had something to hide.

[925] The testimony of PW41, PW43 and PW45 of the MOF showed that the accused had used his position as their 'ultimate boss' to ensure SRC received all the necessary and prompt approval for the issuance of the government guarantees as this was a condition precedent imposed by KWAP to grant the RM4 billion financing and consequently disburse the same. Unusually, in a rare non-adherence to standard procedure, in this case the second RM2 billion was disbursed by KWAP even before the government guarantee was formally issued, courtesy of the accused's phone call to PW45, again showing the special treatment SRC was receiving from its true and ultimate controller, the accused himself, given his private designs on SRC.

Failure to act when told

[926] The accused was in July 2015, personally and directly updated by PW37, the MD of IPSB, the person who authorised the transfer of RM42m from IPSB into the personal accounts of the accused at Am-Islamic Bank (although PW37 said he did not know it went to the accounts of the accused at the material time) of the said transfers when PW37 met with the accused, not long after PW37 was released from MACC remand.

[927] Although, according to PW37, the accused had expressed 'shock' and was 'upset' when so informed by PW37, there is no evidence to show that the accused had done anything to follow up on his reaction that was consistent with one who had no knowledge of the transfers. On the contrary he chose to do nothing about it such that knowledge of the monies having been credited into the accused's personal accounts can therefore be reasonably imputed.

[928] The accused did not take steps to clear his name, there was no police report, no official statement, no complaints or any other attempt to even suggest that he did not know anything about the transfers, let alone that he could have been defrauded by irresponsible parties. It should be recalled that news of the alleged wrongdoings on the part of the accused had been first published by *Wall Street Journal* (D771) and *Sarawak Report* (D772) both on 2 July 2015 which led to investigations and the arrest of among others PW37, who subsequently had that meeting with the accused several days after his release from remand.

[929] His lack of action and deafening silence when confronted with these grave allegations, more so considering the fact that he was the sitting Prime

Minister and Finance Minister of the country then, renders the inference that he did have knowledge of the transfers subject to the criminal charges against him compelling and inevitable.

[930] And it was not just PW37 who gave evidence that he had spoken with the accused about the transfers, after the event. As stated earlier, the CEO of YR1M (PW49) too, testified that she had also met the accused sometime in the middle of 2015, and informed him of the said transfers of monies into his personal bank accounts. Similarly he was said to have expressed his shock and anger, but curiously again, the accused did not do anything about it. No reports of any sort. Nor actions to clear his name or explain the situation.

[931] Despite expressing apparent shock and anger, the accused also did not ask either PW37 or PW49 to lodge any police reports. Neither I repeat did the accused himself lodge one, or made any inquiries to ascertain the truth or rectify any errors, a conduct which in my view was not at all usual given the circumstances, especially considering the status of the accused then as the Prime Minister and the minister in charge for the nation's finances.

[932] Neither did the accused seek any explanation from Am-Islamic Bank on the transactions in question. There were no queries, no complaints, no threat of legal action, and no police report against the bank. But for the record, towards the end of the prosecution's case in this trial, after Joanna Yu (PW54) had finished giving her evidence, the accused filed a civil suit against the bank and PW54 for allegedly executing transactions in his accounts which were not authorised by the accused.

[933] This however, considering especially the reports by *Wall Street Journal* and *Sarawak Report* in July 2015 and the press announcement by the former attorney general in January 2016 clearing the accused of any criminal wrongdoings, is plainly an afterthought.

[934] It appears that the accused was not interested to find out the truth as to how, for instance, it all had happened, how to rectify the errors, how the funds were spent subsequently. If nothing else, the accused must have been very concerned if not exceedingly troubled by the urgent need to take decisive and immediate measures to protect the dignity and honour of the highest executive office of the land — that of the Prime Minister of Malaysia when confronted with allegations of gross financial wrongdoings. Still, there was nothing.

[935] The absence of such conduct is, in my view entirely unbecoming of any reasonable person when informed of any unlawful deposits of funds into his private account without his consent. And here the person, namely the accused, was also at the material time, the leader of the nation.

[936] The evidence on the absence of action on the part of the accused when informed about the transfers is one which is not contemporaneous with but subsequent to the period stated in the charges. It is evidence of subsequent conduct. It is relevant but is not by itself sufficient to establish the mental element of the accused in respect of the offences he was charged with. However other evidence that I have discussed is more directly pertinent to the accused's state of mind at the material period.

DEFENCE OF DENIAL OF KNOWLEDGE

Whether the contention of the defence on absence of knowledge valid

[937] During the cross-examination of the witnesses for the prosecution, the defence did not really challenge that the monies were indeed deposited into the accused's personal accounts at Am-Islamic Bank, or even dispute the evidence adduced by the prosecution that the accused had subsequently used the monies. The accused did not seek to proffer any account or reasons for the monies received into his account, other than the unsubstantiated suggestion that it was for CSR purposes. The one consistent challenge put to the prosecution witnesses however, particularly to PW54 (the AmBank relationship manager) and PW57 (the investigating officer) is that the accused did not have knowledge that the relevant monies in his account were, in fact, the property of SRC.

[938] One would ordinarily not spend on funds one does not have. In fact one could not possibly do so. Here the defence argues that the accused did not know that the funds came from SRC and that his spending was assumed to have been made possible by the Arab royalty donations.

[939] The argument that the accused did not know the balances in his accounts as he did not manage his own accounts lacks substance because the persons whom the accused had tasked with that responsibility, namely Nik Faisal and Datuk Azlin must have had communicated with and apprised the accused of the balances and sources of funds to enable the accused continue issuing the many and various cheques that ran into hundreds of millions in RM. The person whom the accused did not identify as one who helped manage his accounts, namely Jho Low in fact has been shown in the BBM messages (P578) and confirmed in the testimony of PW54 to have had been in active contact with the accused on matters pertaining to the details of balances and management of his accounts.

[940] And in any event, I have earlier set out in some detail the overwhelming evidence which strongly militate against this stance of the accused on lack of knowledge. On the contrary the evidence shows both that the accused had full

knowledge, given his affidavit admission as well as that by the process of inference, he must have known that the RM42m from SRC were deposited into his personal accounts.

Whether Jho Low and others deceived the accused

[941] The other suggestion by the defence put to PW54 is that the accused had been misled by Jho Low and his associates, such as Nik Faisal who had conspired against the accused, and had illegally authorised the bank to execute transactions in and out of his personal accounts which were not known to, much less consented by the accused. Again however, the same evidence which establishes the accused had the requisite knowledge of the status of his accounts at the material time or from which knowledge and dishonest intention can be easily inferred, as discussed above, plainly negates this contention.

[942] Furthermore, it is quite far-fetched if not absolutely incredulous to even conjure a suspicion that a few individuals known, and close to the accused would have the audacity to defraud the sitting Prime Minister of the country. Furthermore, there is no assertion as to the purpose of such an alleged scheme against the accused. There is no suggestion that these rogue individuals had benefitted from their alleged manipulation of the personal accounts of the accused. On the contrary the accused benefitted from having to continually making payments out of his personal accounts, from movements of funds which originated from SRC, now subject to the seven charges before this court.

Whether the Arab royalty donation version tenable

[943] At the same time the one other key contention of the defence related to his denial of knowledge of the SRC's RM42m is that the funds that he had spent on came from Arab royalty donations.

[944] In my view however, the contention that the accused had believed that the source of the funds in his accounts was the alleged donation from the Arab royalty is difficult to sustain because in addition to the evidence of knowledge of the transactions and of status of his accounts which I have set out, evidence of money trail in bank documents further shows that the said bulk of the donations was either returned (in 2013) and the remainder had been fully utilised several months before the deposit of the RM42m from SRC in the accounts of the accused beginning late December 2014.

[945] Even though the defence pointed to another tranche of a series of an alleged Arab donation in 2014, its total amount was only RM49m whilst the utilisation by the accused was more than triple that amount during the pertinent period of the later part of 2014 and early 2015. The accused must

have known he did not have that much funds in his accounts, such that his continued spending must have meant and raised the inference that he knew there were other sources of funds which included SRC (other than cash deposits) that had been pumped into his Accounts 880 and 906. It is irresistible that an inference of dishonest intention to cause wrongful gain to himself and wrongful loss to SRC end of December is to be drawn from this knowledge of the accused, and from the evidence as set out earlier.

Whether there is wrongful loss and wrongful gain

[946] Reference ought also to be made to another case referred to by the prosecution, that of *Ang Teck Hwa v Public Prosecutor* [1988] 1 MLJ 279, where Wee Chong Jin, Chief Justice of Singapore clarified in the context of CBT on the scope of dishonesty as defined under s 24 of the Singaporean Penal Code (similar to the Malaysian equivalent):

> It should be noted that pursuant to section 24 of the Penal Code, 'whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person is said to do that thing dishonestly'. Under the master agreement, the appellant was not entitled to use the money for his own purposes; therefore his doing so would be a wrongful gain to himself and a wrongful loss to SLF. However, to show dishonesty it must be shown that the appellant intended to cause such wrongful gain/loss. To intend a wrongful gain/loss requires that one knows the gain/loss is wrongful. Thus, if the appellant made use of the $5,819.80 for his own purposes knowing that he was not entitled to do so, then he would be doing so with the intention of causing wrongful gain to himself and wrongful loss to SLF. Conversely, if the appellant can show that he did so honestly believing that he was legally entitled to do, then he could not be said to have acted dishonestly.

[947] But merely claiming to be honestly believing one is legally entitled to the gain in question does not render one immune to an inference of dishonesty. In this case, the accused argues that he believed that the SRC funds that he utilised were from the Arab donation. However the Arab donation funds at the material period in late 2014, as mentioned earlier, was only the aggregate remittances of RM49m from the fourth tranche (D604). If the accused truly believed that, then his utilisation of monies in his personal accounts should not have amounted to the triple of that sum.

[948] It is in any event now difficult to deny that the transfer of money out of the account of SRC without any valid basis or explanation that eventually got credited into the accused's accounts clearly means that SRC had suffered wrongful loss of its property. It cannot be disputed that upon the debiting of the RM42m from its account, SRC had been wrongfully deprived of the RM42m specified in the charges. Neither can it be denied that the RM42m which was transferred into the accounts of the accused constituted a wrongful

gain by the accused, not to mention the fact that evidence also demonstrates that the said sum was subsequently utilised by the accused for various purposes.

[949] Any submission by the defence that the RM42m in the accused's accounts is not proof of misappropriation is a patent fallacy. It has been detailed out by the elaborate money trail that the very sum found its origin in the account of SRC. It was transferred to the two accounts of the accused (Account 880 and Account 906) after having been channelled through the two intermediaries which were GMSB and IPSB. Evidence has importantly also demonstrated the presence of knowledge and dishonest intention of the accused.

[950] The prosecution submitted that as the said monies had entered the accused's accounts, he had misappropriated the RM42m as SRC suffered loss of the monies or a wrongful loss whereas the accused had obtained the monies illegally or a wrongful gain. This completes the misappropriation of SRC's funds by the accused.

[951] This submission by the prosecution is correct but not wholly accurate. The offence of CBT completes when either a wrongful loss or a wrongful gain is proved. This is because 'dishonestly' which is an ingredient of the offence of CBT is defined in s 23, as discussed earlier, as essentially the intention of causing a wrongful loss to one person or a wrongful gain to another person. In the instant case however, evidence proves the presence of both wrongful loss to SRC and wrongful gain to the accused. The wrongful loss suffered by SRC occurred first and completes the offence if the other ingredients have also been proved, as has indeed been established. The fact that there is also wrongful gain to the accused evidentially strengthens the case of the prosecution against the accused on the three CBT charges.

[952] I should perhaps add that intention is to be inferred from the evidence, and evidence of intention will invariably be largely circumstantial. The stark enormity of the consequence of the physical element of the offence may also be a basis to draw the inference that such a result was intended. If the accused can orchestrate a major financial fraud of considerable complexity it is difficult for the defence to contend that it is not intentional. It could even be inferred from the actus reus itself. In the English case of *R v Nedrick* [1986] 3 All ER 1 it was ruled that intention may be inferred if the resulting outcome of the offence (such as death in murder) was virtually certain and the accused appreciates this virtual certainty.

[953] The intention to cause wrongful gain or loss may be inferred from the wrongful gain or loss that has been occasioned, or from the manner of how the wrongful gain or loss was effected. Dishonesty, as defined, means having the

intention to cause wrongful loss or gain. Intention is strictly not the same as knowledge but it may be inferred from knowledge. Knowledge, in turn should not be inferred from the actus reus of the offence as proved but from the surrounding circumstances of the case. Intention is primarily volitional or deliberate, whilst knowledge is wholly cognitive.

[954] In this case the intention is inferred from evidence of the wrongful loss that has been caused to SRC and the wrongful gain to the accused, and in light of the evidence of the surrounding circumstances, including the involvement of the accused in having caused the wrongful gain and loss, as earlier stated.

[955] In light of the above weight of evidence and in the further absence of any meaningful and credible explanation for the transfers or the source of the funds, the drawing of the irresistible inference that he knew about or consented to the transfers such that the accused therefore had misappropriated and converted the SRC's RM42m with dishonest intention is the only conclusion that can be justifiably arrived by this court.

Decision on the three CBT charges at the end of the prosecution case

[956] For the above reasons, I find that on a maximum evaluation of all credible evidence, the prosecution has established all the ingredients of the offence of CBT as framed in the three charges.

THE THREE MONEY LAUNDERING CHARGES

The charges

[957] The three money laundering charges, as amended, against the accused, which are premised under s 4(1) of the AMLATFPUAA read as follows:

The first charge

> Bahawa kamu, pada atau lebih kurang 26 Disember 2014, di AmIslamic Bank Berhad, Bangunan AmBank Group, No 55, Jalan Raja Chulan, di dalam Wilayah Persekutuan Kuala Lumpur, telah menerima wang berjumlah dua puluh tujuh juta Ringgit Malaysia (RM27,000,000.00), yang merupakan hasil daripada aktiviti haram, melalui Real Time Electronic Transfer of Fundsand Securities ('RENTAS') dalam akaun kamu yang bernombor 2112022011880 di AmIslamic Bank Berhad, dan oleh itu kamu telah melakukan kesalahan di bawah seksyen 4(1)(b) Akta Pencegahan Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil Daripada Aktiviti Haram 2001 [Akta 613] yang boleh dihukum di bawah seksyen 4(1) Akta yang sama.

The second charge

> Bahawa kamu, pada atau lebih kurang 26 Disember 2014, di AmIslamic Bank

Berhad, Bangunan AmBank Group, No 55, Jalan Raja Chulan, di dalam Wilayah Persekutuan Kuala Lumpur, telah menerima wang berjumlah lima juta Ringgit Malaysia (RM5,000,000.00), yang merupakan hasil daripada aktiviti haram, melalui Real Time Electronic Transfer of Fundsand Securities ('RENTAS') dalam akaun kamu yang bernombor 2112022011906 di AmIslamic Bank Berhad, dan oleh itu kamu telah melakukan kesalahan di bawah seksyen 4(1)(b) Akta Pencegahan Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil Daripada Aktiviti Haram 2001 [Akta 613] yang boleh dihukum di bawah seksyen 4(1) Akta yang sama.

The third charge

Bahawa kamu, pada atau lebih kurang 10 Februari 2015, di AmIslamic Bank Berhad, Bangunan AmBank Group, No 55, Jalan Raja Chulan, di dalam Wilayah Persekutuan Kuala Lumpur, telah menerima wang berjumlah sepuluh juta Ringgit Malaysia (RM10,000,000.00), yang merupakan hasil daripada aktiviti haram, melalui Real Time Electronic Transfer of Fundsand Securities ('RENTAS') dalam akaun kamu yang bernombor 2112022011880 di AmIslamic Bank Berhad, dan oleh itu kamu telah melakukan kesalahan di bawah seksyen 4(1)(b) Akta Pencegahan Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil Daripada Aktiviti Haram 2001 [Akta 613] yang boleh dihukum di bawah seksyen 4(1) Akta yang sama.

[958] The three charges are the same save for the dates and amount, where each of the three charges appears to refer to the RM27m, RM5m and RM10m specified in the three CBT charges, respectively, which in aggregate amount to RM42m.

The law

[959] The offence of money laundering is defined in s 4 of the AMLATFPUAA in the following terms:

4 Offence of money laundering

(2) Any person who —

(a) engages, directly or indirectly, in a transaction that involves proceeds of an unlawful activity or instrumentalities of an offence;

(b) acquires, receives, possesses, disguises, transfers, converts, exchanges, carries, disposes of or uses proceeds of an unlawful activity or instrumentalities of an offence;

(c) removes from of brings into Malaysia, proceeds of an unlawful activity or instrumentalities of an offence; or

(d) conceals, disguises or impedes the establishment of the true nature, origin, location, movement, disposition, title of, rights with respect to, or ownership of, proceeds of an unlawful activity or instrumentalities of an offence,

commits a money laundering offence and shall on conviction be liable to imprisonment for a term not exceeding fifteen years and shall also be liable to a fine of not less than five times the sum or value of the proceeds of an unlawful activity or instrumentalities of an offence at the time the offence was committed or five million ringgit, whichever is the higher.

For the purposes of subsection (1), it may be inferred from any objective factual circumstances that —

(c) the person knows, has reason to believe or has reasonable suspicion that the property is the proceeds of an unlawful activity or instrumentalities of an offence; or

(d) the person without reasonable excuse fails to take reasonable steps to ascertain whether or not the property is the proceeds of an unlawful activity or instrumentalities of an offence.

For the purposes of any proceedings under this Act, where the proceeds of an unlawful activity are derived from one or more unlawful activities, such proceeds need not be proven to be from any specific unlawful activity.

A person may be convicted of an offence under subsection (1) irrespective of whether there is a conviction in respect of a serious offence or foreign serious offence or that a prosecution has been initiated for the commission of a serious offence or foreign serious offence.

[960] Any of the conduct stated in s 4(1)(a), (b), (c) and (d) may amount to a money laundering offence. Significantly, in each of the said money laundering offence, the prerequisite specified in the respective paragraphs of sub-ss 4(1)(a), (b), (c) and (d) is that there must be proceeds of an unlawful activity (or instrumentalities of an offence). And the position is virtually the same for the definition of money laundering before the amendment which resulted in the present s 4(1).

[961] The three money laundering charges in this case allege that the accused had received proceeds of an unlawful activity, which is as stated in the charges, in contravention of s 4(1)(b) of the AMLATFAPUAA.

[962] Under s 4(1)(b), the three elements that must therefore be established by the prosecution are first, the accused had received the said monies; secondly, the monies received are the proceeds of an unlawful activity; and thirdly, on the mental element of the crime, the presence of knowledge of the accused on the source of the proceeds, which under s 4(2), can be inferred from objective factual circumstances.

[963] Thus the monies received by the accused must be proceeds of an unlawful activity. The words 'proceeds of an unlawful activity' is defined under s 3 as follows:

'proceeds of an unlawful activity' means any property, or any economic advantage or economic gain from such property, within or outside Malaysia —

(a) which is wholly or partly —

(i) derived or obtained, directly or indirectly, by any person from any unlawful activity;

(ii) derived or obtained from a disposal or other dealings with the property referred to in subparagraph (i); or

(iii) acquired using the property derived or obtained by any person through any disposal or other dealings referred to in subparagraph (i) or (ii); or

(b) which, wholly or partly, due to any circumstances such as its nature, value, location or place of discovery, or to the time, manner or place of its acquisition, or the person from whom it was acquired, or its proximity to other property referred to in subparagraph *(a)*(i), (ii) or (iii), can be reasonably believed to be property falling within the scope of subparagraph *(a)*(i), (ii) or (iii);

[964] It is manifest that the proceeds must relate to any of the circumstances above vis a vis an unlawful activity which is itself also defined under s 3 as follows:

'unlawful activity' means —

(a) any activity which constitutes any serious offence or any foreign serious offence; or

(b) any activity which is of such a nature, or occurs in such circumstances, that it results in or leads to the commission of any serious offence or any foreign serious offence,

regardless whether such activity, wholly or partly, takes place within or outside Malaysia;

[965] Section 3 further defines 'serious offence' as follows:

'serious offence' means —

(a) any of the offences specified in the Second Schedule;

(b) an attempt to commit any of those offences; or

(c) the abetment of any of those offences.

[966] An unlawful activity as such refers to a serious offence which is any one of the various and many offences listed in the Second Schedule to AMLATFPUAA which includes s 23 on the offence of using office or position for gratification under the MACC Act and the offence of criminal breach of trust under s 409 of the Penal Code. These offences listed in the Second

Schedule are the predicate offences for the money laundering offence. Section 4(1) of the AMLATFPUAA itself is listed in the Second Schedule to AMLATFPUAA. As such all the offences under which the accused is charged in this case 'serious offences' within the meaning of s 3 of the AMLATFPUAA.

The first element — Receipt of RM42m

[967] On the first element of receipt, I have already made the findings that bank documents and records as well as testimonies from a number of witnesses from the relevant banks on the money trail already show that the accused had received the total sum of RM42m which originated from SRC in two of his bank accounts in his Account 880 and Account 906 on the dates and during the period as specified in the three charges.

[968] The details have been set out in the earlier analysis on misappropriation and utilisation of the funds. Nevertheless, to ensure maximum evaluation of all evidence in respect of these three money laundering charges, I should nevertheless summarise the evidence on the receipt by the accused of the RM42m in the context of these money laundering charges.

The RM27m and RM5m (first and second amended charges)

[969] These two transfers are subject to the first and second amended charges and are taken together because they took place on the same day pursuant to the same instructions concerning common facts.

[970] The starting point is the transfer out of RM40m from SRC, from which amount, the RM27m and the RM5m came about. Given his overarching control of SRC, and being entrusted with dominion over the property of the company, the accused procured his link with the directors of SRC, Nik Faisal, a director (and previously CEO) of SRC (who was also the mandate holder for the three personal account of the accused) to authorize the transfer of the RM40m from SRC's Am-Islamic Bank account (P62) to GMSB's Am-Islamic Bank account (P64).

[971] This authorization is contained in the instruction letter dated 24 December 2014 (P258) issued by SRC, signed on its behalf by Nik Faisal and a fellow director, Datuk Suboh (PW42) who testified he was merely following the request made by Nik Faisal, and given his usual understanding that the direction had come from the accused, through Nik Faisal. Emails (P259 and P260) also confirmed this communication. Banking documents and statements of account further confirmed the transfer.

[972] Secondly, from GMSB, the said RM40m was on-transferred to IPSB in the latter's account at Affin Bank (P64). GMSB's instruction letter dated 24 December 2014 (P267) was similarly signed by Nik Faisal and PW42. PW24, a manager at AmBank's Remittance Centre confirmed the execution of the transfer through RENTAS. PW20, a processing officer at Affin Bank and PW30 confirm that IPSB's Affin Bank account (P77) received the sum of RM40m via RENTAS from GMSB's Am-Islamic Bank account. Bank documents and the statement of accounts of both transferor and transferee further record this transfer.

[973] Thirdly, from IPSB, PW37, its MD said he received an email dated 24 December 2014 (P480) from PW49 instructing PW37 to transfer RM27m and RM5m from IPSB's bank account into the two personal accounts namely the Account 880 and Account 906 (even though both PW49 and PW37 claimed they did not know the identity of the owners of the two accounts then). PW36, a staff of PW37 followed up on the paper work for the transfer. Of importance were a remittance form dated 26 December 2014 for the sum of RM27m (P402) and a remittance form dated 26 December 2014 for the sum of RM5m (P403).

[974] PW30 of Affin Bank testified that the two remittance forms were executed, and the receipt of the funds of RM27m and RM5m was confirmed by PW21, the AmBank JRC Branch Manager, as well as by PW24, the manager at AmBank's Remittance Centre. Again, bank documents and statements of accounts of IPSB and of the two personal accounts of the accused confirmed the transfers.

The RM10m (third amended charge)

[975] Again for the RM10m specified in the third money laundering charge, the starting point, on evidence, is SRC. The accused, given his control and dominion over the property of SRC, through Nik Faisal, caused the transfer by SRC's Am-Islamic Bank account (P62) to GMSB's Am-Islamic Bank account (P64) by way of two SRC instruction letters dated 5 February 2015 (P262-A) and 6 February 2015 (P264A) signed by both Nik Faisal and PW42, authorising Am-Islamic Bank to transfer separate sums of RM5m each to GMSB. The execution of the transfer on the respective dates was further confirmed by banking records and statements of accounts of the transacting parties.

[976] From GMSB, another two instruction letters dated 5 February 2015 (P268) and 6 February 2015 (P269A) signed also by Nik Faisal and PW42 authorised the transfers of the said sum of RM5m each to IPSB's Affin Bank account. PW24, of AmBank's Remittance Centre, testified that the two GMSB

instruction letters were duly processed and the transfers via RENTAS were successfully executed. At the receiving end, PW20, of Affin Bank, as well as PW30 testified to IPSB's account having received two credit transfers of RM5m each, via RENTAS on 5 February 2015 and 6 February 2015 from GMSB. Again, bank documents and statements of accounts record the said transfers.

[977] From IPSB, again the instruction was received by PW37 from PW49 to transfer the entire RM10m from the same IPSB account to Account 880. PW36 did the paper work, and after a one day delay due to inability to submit the remittance form on 9 February 2015, the transfers only took place the day after on 10 February 2015 on the basis of a remittance form dated 10 February 2015 (P404).

[978] PW30 of Affin Bank confirmed that the remittance form (P404) was successfully processed out and the said RM10m was received by Am-Islamic Bank (refer PS-SP30 paras 36–38), as further testified by AmBank's PW21 and PW24. And again, bank documents, and the relevant statements of accounts further confirmed the transfer of the RM10m from IPSB to Account 880 of the accused.

[979] Given the summary of the flow of funds as above (the version with greater details has been analysed in the earlier section on the three CBT charges), in my judgment, evidence, overwhelming and incontrovertible, has more than amply established that the accused had received in his personal bank accounts maintained at Am-Islamic Bank, at its JRC branch, funds which belonged to SRC, on the dates mentioned and in the manner described in the three money laundering charges.

[980] The RM27m in the first amended charge was received in Account 880 of the accused on 26 December 2014, and the RM5m in the second amended charge was also received on 26 December 2014, in Account 906 of the accused. The RM10m in the third amended charge was received in Account 880 on 10 February 2015. All transfers into the said two accounts of the accused maintained at Am-Islamic Bank were effected via RENTAS transaction. It is plain that the first element of the receipt by the accused of the sum totalling RM42m which originated from SRC has been established.

The second element — The RM42m is proceeds from unlawful activity

[981] The second element is to prove that the RM42m is proceeds from unlawful activity. Central to this is to ascertain what the unlawful activity is. It was confirmed by the prosecution in its submissions as is apparent from the evidence adduced at trial that the unlawful activity mentioned in the charges

relate to the single offence under s 23 of the MACC Act and the offences in the three CBT charges.

[982] The law in s 4(1) of the AMLATFPUAA requires that the unlawful activity — which is the predicate offence — must be proved to have been committed in order to sustain a charge of money laundering even if the predicate offence itself is not prosecuted, let alone convicted. This is made clear by the provision in s 4(4) of the AMLATFPUAA.

[983] Her Ladyship Tengku Maimun JCA (now Chief Justice) ruled to the same effect in *Aisyah bt Mohd Rose & Anor v Public Prosecutor*:

> [51] For completeness, we acknowledge that pursuant to s 4(4) of the AMLATFA, the conviction for an offence under s 4(1) can be sustained even without the conviction for a predicate offence. In this appeal, the predicate offence of criminal breach of trust under s 409 of the Penal Code has been proved.
>
> [52] On the totality of the evidence, we are unanimous in our view that the convictions of the first and the second appellant for the first charge are safe. It follows that the offence for the second charge under AMLATFA is also safe. We therefore dismiss the appeal against convictions and we affirm the convictions of the appellants.

[984] In this case the unlawful activity or the predicate offences are the abuse of position offence and the CBT offences. And in this case at the end of the prosecution case, prima facie, as mentioned earlier, the predicate offences have at this stage been shown to have been committed.

[985] There are two issues of considerable importance to a prosecution of a money laundering offence under s 4(1) that I must now address.

The necessity to prove unlawful activity

[986] There appears to be a divergence of views on the pre-requisites of proof to secure a conviction under s 4(1) of the AMLATFPUAA. This is on the question of the element of unlawful activity or the predicate offence. The prosecution says the defence's contention that the prosecution must first and foremost prove charges under s 23 of the MACC Act and s 409 of the Penal Code against the accused as a condition precedent is fallacious.

[987] I agree with the stance of the defence. It is very clear when one examines the language of s 4(1) that it concerns proceeds of unlawful activity which is defined as the predicate offence, in this case the s 23 of the MACC Act and s 409 of the Penal Code offences. If follows that the prosecution must prove that the element of an unlawful activity is satisfied. I accept that a prosecution, let

alone a conviction of these predicate offences is not necessary. That is crystal-clearly set out in s 4(4) of the AMLATFPUAA itself, and reiterated in a number of cases. But the prosecution is not relieved of its duty to still prove that the predicate offences have been committed.

[988] I should add that the definition of unlawful activity as I set out earlier is not confined only to the activity which constitutes a predicate offence (the serious offence as defined in the Act) but also any activity which is of such nature, or occurs in such circumstances that it results in or leads to the commission of any serious offence. Sub-paragraph (b) of the definition states that 'any activity which is of such a nature, or occurs in such circumstances, that it results in or leads to the commission of any serious offence'.

[989] This means that an unlawful activity need not necessarily be only the predicate offence itself, but can also be an activity which results in the predicate offence. As such even though in my view that in all cases, the unlawful activity must be established, it does not mean that the predicate offence itself must be proved to have been committed. It suffices also that an activity that leads to the commission of the offence be established.

[990] The prosecution is not wrong when it submits that a money laundering offence as defined under s 4(1) of the AMLATFPUAA is concerned with the proceeds of an unlawful activity, and that it is a post-predicate offence activity of knowingly dealing with the unholy fruits of an unlawful activity. But the prosecution must show that the unlawful activity — the predicate offence or an activity which results in the commission of the predicate offence — has been committed.

[991] The prosecution attributes its view to the observations made by His Lordship Abang Iskandar JCA (now CJ (Sabah and Sarawak)) in *Azmi bin Osman v Public Prosecutor and another appeal* [2016] 3 MLJ 98; [2015] 9 CLJ 845, as follows:

> [35] As was alluded to earlier, it is immaterial that he, or for that matter anyone, is not convicted for the predicate serious offence. It is money laundering, for example, if he engages in any manner involving proceeds of an unlawful activity if he, without reasonable excuse, fails to take steps to ascertain whether or not the property is the proceeds of an unlawful activity. The law recognises the difficulty that the investigation may face in absolutely establishing the direct nexus between the accused and the illegal proceeds from the unlawful activity. That was the reason as to why the definition of money laundering has been couched in the manner that appears under s 3 of the AMLATFA in which para (aa) imputes knowledge of the proceeds being from an unlawful activity viewed from an objective factual circumstance, and under para (bb) in respect of a natural person, his conduct, where he had without reasonable excuse failed to take steps to ascertain that the monies are not proceeds of an unlawful activity, namely a duty is cast on him to take steps to

A ascertain the nature of the proceeds, in terms of their lawfulness or legitimacy ...

[992] I think it is quite plain that the point being made in the passage concerns the element of knowledge for money laundering offences which is presently provided for in s 4(2)(a) and (b) of the AMLATFPUAA. There is however in my view nothing in the judgment that dispenses with the need to prove the commission of an unlawful activity.

[993] I am of the view that if the charges under s 23 of the MACC Act and s 409 of the Penal Code, being the predicate offences (or any activity which results in the commission of the predicate offence) or the 'unlawful activity' in this case, have not been proven to have been committed, the RM42m from SRC cannot validly be said to have been 'derived and/or obtained directly or indirectly' by the accused from the said unlawful activity, and as such the physical elements of the money laundering charges cannot be made out.

[994] The prosecution also advances its position by relying on s 4(3) of the AMLATFPUAA which reads as follows:

> (3) For the purposes of any proceedings under this Act, where the proceeds of an unlawful activity are derived from one or more unlawful activities, such proceeds need not be proven to be from any specific unlawful activity.

[995] The prosecution argues that for the purposes of proving the three money laundering charges under s 4(1), where the proceeds of an unlawful activity are derived from one or more unlawful activities, being s 23 of the MACC and s 409 of the Penal Code in the instant case, such proceeds need not be proven to be from any specific unlawful activity. Again, I do not think the prosecution's interpretation of s 4(3) is wholly accurate.

[996] It is plain from the words in the provision that it is unnecessary to prove the specific unlawful activity from which proceeds is derived, but this is the position only if the proceeds is derived from one or more unlawful activities. This means that it must still be first established that the proceeds in contention is derived from one or more unlawful activities, before the necessity of proving which specific unlawful activity can be done away with.

[997] The prosecution also refers to the decision of the High Court in *Aishah Mohamed Rose & Anor v Public Prosecutor* [2014] 1 LNS 957 in which case the accused persons were similarly charged under s 409 of the Penal Code and s 4(1) of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ('the AMLATFA') (predecessor to the present AMLATFPUAA), where it was held that:

> It was argued by learned counsel as the prosecution could not prove the predicate

offence under s 409 of the Penal Code, the offence under s 4(1) of the AMLATFA could not, therefore, be established. The sustainance of the offence under s 4(1) of the AMLATFA is not dependant on the offence of criminal breach of trust under s 409 of the Penal Code. The case of money laundering is a stand-alone offence.

[998] But a careful read of this judgment would also lead one to this passage:

The effect of s 4(2) of the AMLA is very wide and far reaching. Section 4(2) clearly provides that both the accused or for that matter any person need not to be charged for the commission of a serious offence.Even if the accused or any person is charged for such an offence it need not be that the accused or the person charged must be convicted of the serious offence for purposes of the s 4(1) of the AMLA offence. *What is required for purposes of s 4(1) of the AMLA is that the unlawful act in the serious offence such as an act of forgery, forgery of a valuable security, using as genuine a forged document or cheating is committed is sufficient.* In other words, there is no requirement to prove who committed the serious offence or that the person who committed it must be charged or convicted of that offence. However, drastic s 4(2) of the AMLA may sound this is the intention of legislature. The intended purpose of the anti-money laundering laws is to recover proceeds obtained from any unlawful activity (see *PP v Gan Kiat Bend & Anor* [2011] 8 CLJ 951). (Emphasis added.)

[999] Clearly a distinction must be drawn between a conviction and the commission of the predicate offence. The High Court in that decision suggests that proof of the commission of the predicate offence for the purpose of establishing the money laundering charges is imperative. And this does not mean a conviction of the predicate offence is a condition precedent to a conviction of the money laundering offence.

[1000]It is instructive to refer again to the decision of the Court of Appeal in *Aisyah bt Mohd Rose & Anor v Public Prosecutor* [2016] 1 MLJ 840; [2016] 1 CLJ 529 where Her Ladyship Tengku Maimun JCA (now Chief Justice), delivering the judgment of the court stated:

[50] Moving on to the second charges under the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ('the AMLATFA'), s 4(1) provides that any person who engages in or attempts to engage in money laundering commits an offence. Money laundering as defined in s 3(1) of the AMLATFA is the act of a person who engages directly or indirectly, in a transaction that involves proceeds of an unlawful activity. Unlawful activity is any activity which is related, directly or indirectly to any serious offence or any foreign serious offence. Under the Second Schedule of AMLATFA, the offence under s 409 of the Penal Code has been listed as a serious offence.

[51] *For completeness, we acknowledge that pursuant to* s 4(2) of the AMLATFA, the conviction for an offence under s 4(1) can be sustained even without the conviction for a predicate offence. In this appeal, the predicate offence of criminal breach of trust under s 409 of the Penal Code *has been proved.*

> [52] On the totality of the evidence, we are unanimous in our view that the convictions of the first and the second appellants for the first charge are safe. It follows that the offence for the second charge under AMLATFA is also safe. We therefore dismiss the appeal against convictions and we affirm the convictions of the appellants. (Emphasis added.)

[1001]In other words, in that case, clearly the predicate offence of CBT had been proved.

[1002]Indeed, in my view, the Court of Appeal decision in *Azmi bin Osman v Public Prosecutor and another appeal* [2016] 3 MLJ 98; [2015] 9 CLJ 845 too found that the unlawful activity or the predicate offence, in that case of bribery, had been proved. This is borne out in the following passage:

> [40] In this case, it was not disputed that the accused had been proven to have accepted bribes from persons who were involved in illegal gambling. In crude terms, the accused was on the payroll of these people, whom he had abstained from taking enforcement action against. He had been receiving proceeds from illegal gambling activity in exchange for him giving protection for them, from enforcement action against them by the police. With that as a backdrop, there existed grounds for the accused to reasonably believe that the monies he received and banked into his Maybank accounts were proceeds from unlawful activity. At the same time, these monies were also corrupt monies, being bribes given to him by the gambling operators (see Second Schedule).

[1003]Although the defence cited the decisions of the Court of Appeal in *Public Prosecutor v Billion Nova Sdn Bhd & Ors* [2016] MLJU 1823; [2016] 2 CLJ 763 and *Public Prosecutor v Kuala Dimensi Sdn Bhd & Ors* [2018] 6 MLJ 37 wherein it was held that in a forfeiture application under s 56 of the AMLATFA, a forfeiture order can only be made if, among others, an offence under s 4(1) of the AMLATFA has been proved to have been committed, these cases, in my view would however not entirely assist the argument of the defence.

[1004]This is because the proceedings in these cases are in a nature of an application for forfeiture. They do not concern criminal proceedings as defined in s 3 of the AMLATFPUAA (to mean a trial of person primarily for a serious offence), and where a pre-requisite to the application under s 56 is that there is no prosecution for a money laundering offence. These are also decisions on the provisions in AMLATFA instead of the presently governing AMLATFPUAA.

[1005]In any event, only on the last point, I would instead refer to the Court of Appeal decision in *Noor Ismahanum Mohd Ismail v Public Prosecutor* [2019] 2 MLJ 536; [2018] 10 CLJ 597, which is a decision on a forfeiture under AMLATFA, in particular to the following explanation made by Abdul Rahman

Sebli JCA (as he then was):

> [17] In determining whether the property is 'the proceeds of an unlawful activity', the standard of proof to be applied by the judge is the civil standard of proof, ie proof on the balance of probabilities, as stipulated by ss 56(4) and 70(1). This standard of proof must not be mistaken for proof beyond reasonable doubt, which is the heavier standard of proof that the public prosecutor is required to discharge in order to bring home a criminal charge against any person, such as a charge under s 4(1)(a) of the AMLATFA.
>
> ...
>
> [40] We failed to see how this case could be of assistance to the appellant as the monies deposited in the two bank accounts had been found by the learned JC to be the proceeds of illegal deposit taking, ie, 'the proceeds of an unlawful activity' within the meaning of s 56(2)(a)(iii) of the AMLATEPUA. In other words, it had been proved that the monies in the two bank accounts were 'more probable than not' the proceeds of an unlawful activity. Having made this finding of fact, the learned JC had no option but 'shall' make an order of forfeiture, which he did.

[1006]The forfeiture cases, especially *Noor Ismahanum Mohd Ismail v Public Prosecutor* in my view show that when the element of 'proceeds of unlawful activity' is contained in the relevant statutory provision subject to any proceeding, such element must surely, as is rudimentary, be established to have been satisfied to justify the invocation of that provision. The extent and manner of proof should however be dependent on other requirements governing the relevant specific provisions.

[1007]After all, even though both a criminal prosecution under s 4(1) of the AMLATFPUAA and a forfeiture application under s 56 of the same Act concern, amongst their integral features, the proceeds of unlawful activity, the conduct of the two proceedings are different. To mention only one key distinction, for the latter, the standard of proof is the civil standard of proof which is on balance of probabilities, as highlighted in *Noor Ismahanum Mohd Ismail v Public Prosecutor* referred to above.

[1008]To conclude the analysis on this issue, I reiterate that it is necessary in a prosecution under s 4(1) of the AMLATFPUAA for the prosecution to adduce evidence to prove that an unlawful activity — in this case, the s 23 of the MACC Act and the s 409 of the Penal Code charges, or any activity which results in the commission of such offences, have been committed. If the unlawful activity or the predicate offence, or any activity which results thereto (as 'unlawful activity' is defined in AMLATFPUAA) is not established, there can be no proceeds that are derived therefrom. In this case however, I have in any event already ruled that the charges for these predicate offences of abuse of position for gratification and CBT have been prima facie proven at the end of the prosecution case.

Whether proceeds is also the same fund misappropriated under CBT and obtained as gratification under abuse of position charge

[1009]It is of some interest to note that the prosecution submitted that the offence of money laundering is concerned with the proceeds of an unlawful activity, emphasising that it is a post-predicate offence activity of knowingly dealing with the unholy fruits of an unlawful activity.

[1010]However, evidence led by the prosecution in this case at trial seems to show that the unholy fruits or proceeds received by the accused in respect of the money laundering charges is the same subject matter proven to have been misappropriated (or converted) by the accused under the s 409 charges, as well as the same received by the accused as gratification under s 23 of the MACC Act. I have already referred to the evidence on the money trail, as summarised above as well as particularly in the analysis on misappropriation and conversion in relation to the three CBT charges.

[1011]At first blush, the proposition that money laundering is a post-predicate offence becomes blurred because the act of receiving under s 4 of the AMLATFPUAA appears to be the same as the misappropriation under s 409 of the Penal Code and the same as the receipt of gratification under s 23 of the MACC Act. In other words, the offence of money laundering here seemingly completes (if proved) at the same time as the completion of the offences under s 409 of the Penal Code and s 23 of the MACC Act. It is, in that sense, not a post-predicate offence. They are all committed simultaneously.

[1012]Indeed, in the instant case, it appears from the facts that the prosecution is relying on the evidence on the crediting of the aggregate of the RM42m into the two accounts of the accused in order to help prove the commission of not only the CBT charges and the abuse of position charge, but also the money laundering charges.

[1013]I give a simple example. A steals cash from B. The offence of theft is complete. A then gives some of the cash to C. The receipt of the cash by C is potentially an offence under s 4(1)(b) of the AMLATFPUAA (subject to, for instance, knowledge on the part of C on the source of the cash be inferred). In this example, the money laundering offence of receiving the cash by C is manifestly an offence committed subsequent to the commission of another offence, that of theft.

[1014]I give another example, involving the same perpetrator. A steals cash from B. The theft is complete. A then uses the cash to pay for his groceries. The use of that case is potentially also a money laundering offence under s 4(1)(b).

[1015]A less straightforward example. A steals cash from B. Can it be said that when A gets hold of the cash in the course of committing the offence of theft, A is also in receipt proceeds of unlawful activity? This example seems to bear some resemblance to the facts in the instant case. But the elements of the individual offences must be carefully appreciated.

[1016]As such it has to be demonstrated that the receipt was of the proceeds which was derived from the unlawful activity. After all money laundering is a post-predicate offence. There may thus be concerns as to whether the RM42m received by the accused in his accounts in the three money laundering charges can be said to be the proceeds which was derived from an unlawful activity since the receipt by the accused of the same could also be said to be an element of the unlawful activity or predicate offence of CBT or abuse of position as framed in the respective charges.

[1017]A variant of this argument was first raised by the defence when it unsuccessfully sought to dismiss the seven charges as defective. And in the oral submission session at the end of the prosecution case, I raised this again, but the prosecution, to my mind, was not able to provide a convincing response to this issue.

[1018]Having examined the statutory provisions relevant to the seven criminal charges, in my judgment, the three money laundering charges can be sustained alongside the other charges and reconcilable with the proposition that money laundering is a post-predicate offence. I accept and firmly subscribe to the legal position that there can only be proceeds once the predicate offence is complete. The proceeds flow from the predicate offence, or more accurately, the unlawful activity.

[1019]In my assessment, evidence nevertheless shows that in respect of the three CBT charges, the misappropriation occurred at the point when the funds of RM42m or any larger part thereof (originally the RM50m) was transferred out of SRC. At this point, such as when the RM42m was transferred into the bank account of GMSB, which was even before the accused received the funds in his accounts as specified in the money laundering charges, an offence of CBT as framed in the three CBT charges was already complete.

[1020]This is because the property under the control and entrustment of the accused was dishonestly misappropriated with the wrongful loss occasioned to SRC. Accordingly, when the RM42m finally flowed into the accused's accounts the said funds could rightly be construed as proceeds of unlawful activity. Incidentally — and this is no less significant — the CBT charges mention only the misappropriation by the accused of the RM42m, not the receipt by the accused of the sum of RM42m.

[1021]In respect of the charge under s 23(1) of the MACC Act, which concerns the prohibition against a public officer using his office for gratification, the offence is complete, having regard to the presumption under s 23(2) discussed earlier, upon the action taken by the officer on a matter in which he has an interest. Receipt of the gratification is strictly not an ingredient of the offence under s 23(1) of the MACC Act. As such, when the gratification is finally received, the offence has already earlier completed. This again means that the receipt may properly be said to be of proceeds of an unlawful activity.

[1022]The other reason why I consider that the charges in this case can be sustained lies in the definition of 'unlawful activity', which I repeat reads as follows:

> 'unlawful activity' means —
>
> (a) any activity which constitutes any serious offence or any foreign serious offence; or
>
> (b) *any activity which is of such a nature, or occurs in such circumstances, that it results in or leads to the commission of any serious offence or any foreign serious offence*,
>
> regardless whether such activity, wholly or partly, takes place within or outside Malaysia; (Emphasis added.)

[1023]The definition of unlawful activity is therefore not confined only to the activity which constitutes a predicate offence (the serious offence as defined in the Act) such as the abuse of position offence or the CBT offence but also any activity which is of such nature, or occurs in such circumstances that it results in or leads to the commission of any serious offence.

[1024]What this therefore means is that an unlawful activity need not necessarily be only the predicate offence itself, but can separately be an activity which results in the predicate offence. It follows that even though in all cases of prosecution under s 4(1) of the AMLATFPUAA, the unlawful activity must be proven, it does not mean that in all cases, the predicate offence itself must be proved to have been committed. Depending on the charges and the evidence adduced at trial, it suffices also that an activity that leads to the commission of the offence be established.

[1025]As such, in the instant case, any objection (assuming it is valid) that the proceeds in the money laundering charges is the same property which completes the offences of CBT and of abuse of position (which is not, as just explained), may be overcome by a finding by this court that on evidence, the proceeds which was received by the accused in the money laundering charges is derived from an unlawful activity which is an activity which had resulted in the commission of the predicate offences.

[1026]For example, based on the evidence already analysed, it can be determined that the RM42m was received by the accused in his Account 880 and Account 906 from his involvement in the financing and guarantee approval processes at KWAP and MOF respectively or participation at the Cabinet meeting (which may be said to be evidence of an unlawful activity as referred to in item (b) of the definition of unlawful activity) which resulted in the commission of an offence under s 23 of the MACC Act, as charged. Alternatively, it can also be found that the proceeds came from another form of unlawful activity as defined in item (b), which is the accused's conduct in procuring the transfer of RM50m from SRC to GMSB given his overarching control and entrustment with dominion over the property of SRC, which then led to the commission of the CBT as framed in the three CBT charges.

[1027]I should also mention that in any event the funds of the RM42m from SRC cannot be treated identically in the different offences because these crimes are constituted by different ingredients.

[1028]Accordingly, I am satisfied that the element of the funds of RM42m received by the accused being proceeds of an unlawful activity has been proved.

Third element — Knowledge of the accused that RM42m is proceeds of unlawful activity

[1029]A useful starting point to illustrate the application of the mental element of knowledge for any prosecution under s 4(1) of the AMLATFPUAA is the following passages from the judgment of His Lordship Abang Iskandar JCA (now CJ (Sabah and Sarawak)) on behalf of the Court of Appeal in *Azmi bin Osman v Public Prosecutor and another appeal* [2016] 3 MLJ 98; [2015] 9 CLJ 845 which instructively observed the rationale of the predecessor to what is now s 4(2)(a) and (b) of the AMLATFPUAA, as follows:

> [35] As was alluded to earlier, it is immaterial that he, or for that matter anyone, is not convicted for the predicate serious offence. It is money laundering, for example, if he engages in any manner involving proceeds of an unlawful activity if he, without reasonable excuse, fails to take steps to ascertain whether or not the property is the proceeds of an unlawful activity. The law recognises the difficulty that the investigation may face in absolutely establishing the direct nexus between the accused and the illegal proceeds from the unlawful activity. That was the reason as to why the definition of money laundering has been couched in the manner that appears under s 3 of the AMLATFA in which para (aa) imputes knowledge of the proceeds being from an unlawful activity viewed from an objective factual circumstance, and under para (bb) in respect of a natural person, his conduct, where he had without reasonable excuse failed to take steps to ascertain that the monies are not proceeds of an unlawful activity, namely a duty is cast on him to take steps to ascertain the nature of the proceeds, in terms of their lawfulness or legitimacy. With respect, we agree with the learned deputy on this issue on the true effect of paras (aa)

and (bb) being the mens rea element in the definition of money laundering under s 3 of the AMLATFA.

[36] Those paras (aa) and (bb) define the mens rea necessary to turn the preceding actus reus (conduct) into a money laundering offence. It does not excuse wilful blindness on the part of the accused person. There is no room for safe harbours, where proceeds of an unlawful activity may find itself quietly nestling in so-called bank accounts of 'innocent' account holders. A bank account holder must be vigilant and must take steps to ensure that monies that are received in his account are not proceeds of any unlawful activity and that he knows that the source of those monies is lawful, lest he runs afoul of AMLATFA and runs the risk of being charged for an offence of money laundering. The doctrine of wilful blindness imputes knowledge to an accused person who has his suspicion aroused to the point where he sees the need to inquire further, but he deliberately chooses not to make those inquiries. Professor Glanville Williams has succinctly described such a situation as follows: 'He suspected the fact; he realised its probability but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone is wilful blindness'. (Glanville Williams, *Criminal Law* 157, 2nd Ed, 1961). Indeed, in the context of anti-money laundering regime, feigning blindness, deliberate ignorance or wilful ignorance is no longer bliss. It is no longer a viable option. It manifests criminal intent.

[1030]The culpability of an accused person under s 4(1) is premised on being knowingly concerned with the illegal proceeds from the unlawful activity. This knowledge, as formulated in s 4(2) is the mental or fault element of a money laundering offence. In other words this third element of the offence of money laundering will be satisfied if it is proved that the accused either knew, or had reason to believe or had reasonable suspicion that the monies which were transferred into his Account 880 and Account 906 as per the three charges were the proceeds of an unlawful activity, or that the accused without reasonable excuse failed to take reasonable steps to ascertain whether or not the monies were the proceeds of an unlawful activity.

[1031]Section 4(2) speaks of the mental element being inferred from objective factual circumstances. Again, evidence from which knowledge and dishonest intention of the accused has been inferred in respect of the CBT charges has been analysed in section on the CBT charges. Much of the same evidence supports the inference to be made under s 4(2) for the three money laundering offences. At the risk of repetition, the key objective factual circumstances established during the prosecution case are several.

[1032]I find that there is no shortage of factual objective set of circumstances that may be justifiably invoked in this case. For there are many and various.

Inference under s 4(2)(a)

The accused's own affidavit admission

[1033]As it turned out, the accused's knowledge of the matter is put beyond doubt when the accused himself in an affidavit dated 23 February 2016 (P616A), relevant to a defamation suit, affirmed to his knowledge that RM42m that entered two of his personal accounts came from SRC.

The accused's instructions to transfer RM32m in P277

[1034]The evidence of his instructions dated 24 December 2014 to Am-Islamic Bank (in P277) to transfer, from his Accounts 880 and 906, RM27m to PBSB and RM5m to PPC on 29 December 2014, is especially telling vis a vis his state of knowledge of the SRC funds, since the exact sum of RM32m from SRC through GMSB and IPSB arrived earlier in his Accounts 880 and 906 on 26 December 2014 to enable payments of the same sum of RM32m be made to PBSB and PPC three days later.

The involvement of Nik Faisal and Datuk Azlin in the funds transfers

[1035]Evidence adduced by the prosecution has established that the transfers of the SRC funds from SRC to GMSB and from GMSB to IPSB prominently featured the involvement of Nik Faisal, a director and authorised signatory in SRC who was also the link person between the directors of SRC and the Prime Minister as well as the mandate holder appointed by the Prime Minister to manage the accused's personal accounts.

[1036]In respect of the transfers of the SRC funds of RM42m from IPSB to the personal accounts of the accused, Ung Su Ling (PW49) testified that she received instructions on the transfers which she relayed to Datuk Dr Shamsul (PW37) from Datuk Azlin, the accused's own principal private secretary.

Communication between Jho Low and the accused

[1037]The BBM conversations (P578) between Joanna Yu (PW54) and Jho Low include messages between Jho Low and the accused which Jho Low forwarded to PW54. These messages included requests by the accused for Jho Low get the update on balances from AmBank and for assistance from AmBank to ensure clearance of credit card purchases in Italy and especially Hawaii which did occur as confirmed by PW47 from AmBank's Credit Card Authorisation and Banking Fraud Management Department and as recorded in the statements of the credit card accounts.

No complaints by the accused to AmBank

[1038]Uma Devi (PW21) the manager for AmBank JRC branch and PW54 the relationship manager from the bank's private banking department are clear in their evidence that there are no complaints from the accused in respect of the many and large transactions involving many of the personal accounts of the accused. In addition, PW47, from the bank's Credit Card Authorisation and Banking Fraud Management Department, confirmed that the credit card statements in P587 were accurate and that the bank had never received any inquiries or complaints of unlawful usages of the accused's Visa and Master Card credit cards.

Non-action after the accused being informed by PW37 and PW49

[1039] The absence of any evidence of inquiries made by the accused, or attempts to clear his name, let alone lodge any police reports despite having been apprised by PW37 and PW49 on the transfers of SRC's RM42m from IPSB to Accounts 880 and 906 belonging to the accused has already been stated earlier. The absence of any reaction by the accused on an immediate basis when confronted with a serious allegation of financial improprieties is inconsistent with one who has nothing to hide.

Utilisation by the accused of the RM27m and the RM5m received on 26 December 2014

[1040]As for the RM27m and the RM5m, barely two days after receipt into two of his accounts, these were transferred out, respectively, to PBSB and PPC on 29 December 2014 on the basis of the accused's own instruction to Am-Islamic Bank in the letter of 24 December 2014 (P277). It is noteworthy that exh P277 is dated 24 December 2014, prior to the receipt of the RM42m from SRC by the accused on 26 December 2014, instructing payment be made to PBSB and PPC on 29 December 2014.

[1041]Evidence, as discussed earlier, shows that these transfers were a repayment to these two entities because the same companies had earlier on 8 July 2014 and 10 September 2014 transferred the sums of the exact amount to the accused's Account 880 and Account 905 respectively. As mentioned earlier, this transfer was confirmed by the various bank documents and statements of accounts, as well with the benefit of the testimony of PW24, the manager at AmBank's Remittance Centre to the same effect, as did PW31, who confirmed that on 29 December 2014, PBSB's account was credited with RM27m via RENTAS.

[1042]Money trail as I have shown earlier (in the analysis on knowledge of the accused in the section on the CBT charges), even demonstrate the utilisation of the RM27m when received by the accused on 8 July 2014 — that it had been fully utilised by the accused. From PW21's testimony, evidence was led to confirm that that RM27m was used by the accused to regularise the balance in his other two accounts — Account 906 and Account 898.

[1043]As stated this included the instruction by his mandate holder via a letter dated 11 August 2014 (P275) to debit a further RM3,282,734.16 from Account 880 on 13 August 2014. Out of this sum, RM449,586.95 was credited into the accused's Visa Platinum Card account, and the balance RM2,833,147.21 was credited into his MasterCard Platinum Card account. The Visa and Master Card credit card statement dated 8 September 2014 (P587) shows that the payment of RM3,282,734.16 was made for the purchases at De Grisogono, Italy on 8 August 2014.

[1044]In addition to the credit card expenditures in August 2014, it is equally as important and a relevant fact to note that the accused had also used his Visa and Master Card for expenditures made in December 2014 and January 2015. The accused's Visa and Master Card credit card statement dated 8 January 2015 (P587) shows that AmBank Visa Platinum was used on 22 December 2014 at Chanel in Honolulu, Hawaii for the amount of USD130,625 (RM466,330.11), and on 4 January 2015, MasterCard Platinum was transacted at the Shangri-La Hotel, in Bangkok, Thailand for RM127,017.46.

[1045]In similar fashion, upon receipt of the RM5m on 26 December 2014 in his Account 906, the same sum was transferred out from the accused's Account 906 on 29 December 2014 on the instruction of the accused (P277), as a repayment to PPC, which had earlier on 10 September 2014 transferred the same amount into Account 906. The bank witnesses and documents confirmed this transfer to PPC without challenge.

[1046]It has also been shown that the sum of RM5m from PPC was used to regularise overdrawn balances in his personal accounts. The bank statement for Account 906 (P110) records that a day before RM5m got credited into Account 906, as at 9 September 2014, that account of the accused was overdrawn by RM4,731,922.97. The whole amount of RM5m that was transferred into the accused's account was therefore fully utilised in one single day to regularise the overdrawn position of the accused's Account 906.

[1047]These dealings with PPC and PBSB were also recorded in the audited financial statements of Putrajaya Perdana Bhd ('PPB') and its subsidiaries

(which include PBSB and PPC) for the financial year ended 31 December 2014 (D661), noting that the transfers to the accused were characterised as advances.

Utilisation by the accused of the RM10m received on 10 February 2015

[1048]Evidence has also been led on the spending by way of the issuance of 15 personal cheques by the accused, as discussed earlier in the context of misappropriation and conversion to one's use in the section on the CBT charges. Suffice that I state in summary fashion that PW5, a Senior Manager at AmBank's Cheque Clearing Centre, confirmed that 14 cheques (P83–P96) were issued out of Account 906 account and one cheque (P97) was from Account 898. The individuals who received these payments had also given evidence and the statement of account for Account 906 (P110) further confirmed clearance of the relevant cheques.

[1049]The bank statement for Account 898 (P109) too shows that the cheque for RM3.5m (P97) to Messrs Hafarizam Wan & Aishah Mubarak was cleared on 22 January 2015 and 11 February 2015. Out of the 15 cheques, only three, which is this P97, as well as P83 and P84 which were cleared before the receipt of the RM10m in Account 906 on 10 February 2015. P83, for RM240,000 and P84, for RM2.5m were both cleared on 5 February 2015. Significantly, the total sum of all 15 cheques is RM10,776,514.

[1050]The picture is as clear as day. With the deposits of the RM42m into Account 880 and Account 906, two of the personal accounts of the accused, the utilisation was swift and total. RM32m was almost immediately repaid to PBSB and PPC upon receipt by the accused in his Account 880 and Account 906 on 26 December 2014. The deposit of RM10m into Account 880 on 10 February 2015 conveniently allowed cheques already issued to be cleared, as well as enabled the accused write more cheques. The accused in consequence vis a vis the charges, spent a total of RM42,776,514 out of the RM42m received from SRC.

The utilisation of the RM42m to repay and regularise earlier spending

[1051]In fact upon receipt on that 10 February 2015, the RM10m was transferred out of the Account 880 into Account 906. This was made to regularise Account 906 as patently shown in its statement in P110 which records that as at 9 February 2015 (a day prior to the deposit of RM10m into Account 880), this Account 906 was overdrawn by RM2,333,084.03. The deposit of RM10m on 10 February 2015 restored the account to a positive balance of RM7,666,915.97.

[1052]Banking records and money trail unmistakably therefore demonstrates that the accused utilised the RM42m from SRC to repay for his earlier spending (the payments to PBSB and PPC, in turn earlier used for other personal expenses and benefit) and regularise overdrawn positions (because of personal overspending) as well as undertake new payments. All these transactions are relevant and so connected with the fact in issue — that of the receipt of SRC's funds of RM42m being proceeds of an unlawful activity — as to form part of the same transaction.

[1053]Thus all these transactions, not just the key deposits of the RM42m specified in the three money laundering charges, but also the many and various other debit and credit entries as recorded in the statements of the accused's Accounts 906, 880 and 898, some of which were later regularised or expended on by the use of the said RM42m, taking into consideration the sheer amounts and frequency of the transactions, are especially pertinent.

[1054]This is so such that when viewed in light of the attendant circumstances objectively as required under s 4(2) of the AMLATFPUAA, in particular his own utilisation and the reasons for the same, as well his personal financial standing with an annual remuneration of not exceeding RM1m, and considered cumulatively with other circumstances as stated, the accused must have known, or must have had reason to believe or a reasonable suspicion that the RM42m that was deposited into his accounts on 26 December 2014 and 10 February 2015 as per the three money laundering charges was the proceeds of an unlawful activity. In any event he had failed to have taken steps to enquire into the provenance of the funds in the accounts during the relevant period.

The accused's private interest in SRC and commission of CBT and abuse of position

[1055]The one other important objective circumstances is the finding on the accused's private interest given his dominant controlling position in SRC, which is the very entity from which the RM42m was transferred out. In addition, nor can the finding on the accused's personal involvement which later resulted in the commission of the offences of abuse of position and the CBT not be taken into consideration.

[1056]He was instrumental in SRC securing a financing of a colossal sum of RM4 billion from KWAP on the strength of government guarantees proceeds by MOF and approved by the Cabinet which he led. That was the abuse of position offence under s 23 of the MACC Act offence. He then consolidated his overarching control of SRC, which gave him entrustment with dominion over the property of SRC which enabled funds be withdrawn out of the bank account of SRC. These are the three CBT charges under s 409 of the Penal

Code. These are events and conduct of his prior to the receipt of the RM42m on 26 December 2014 and 10 February 2015. These provide compelling basis for the law to infer that the accused must have known that the RM42m which was credited into his accounts was SRC's.

[1057]It simply beggars belief and stretches one's credulity for the accused not to have known or at least have a reasonable suspicion (s 4(2)(a)) that the deposit of a massive total sum of RM42m into two of his personal accounts is a proceeds of an unlawful activity, especially when he then immediately utilised the entire sum. There is not even a hint of suggestion that this sum of RM42m was after all the accused's own property, for example from some family or inheritance sources. If these had been erroneously credited (which they manifestly are not, considering the background transactions), the accused is obliged to return the entire sum to the sender. This did not happen either. The accused used the whole sum of RM42m. This was a huge sum of money by any standard, even for a sitting Prime Minister.

[1058]The above-stated objective factual circumstances point to the inevitable inference that he accused must have known or had reasonable suspicion that the RM42m was proceeds of unlawful activity such that the accused knew or must have had knowledge that the RM42m that flowed into his personal accounts came from SRC, in pursuance of s 4(2)(a) of the AMLATFPUAA ('s 4(2)(a)').

Inference under s 4(2)(b) and wilful blindness

Similar objective circumstances

[1059]In addition the accused had also plainly come within the ambit of the mental element in s 4(2)(b) as well. This provision encapsulates the doctrine of wilful blindness.

[1060]This is because, even more difficult to fathom, is the absence of any enquiries on the part of the accused to ascertain whether the RM42m, which was never claimed to be his, was in actual fact, proceeds of any unlawful activity (s 4(2)(b)). PW21, the manager for AmBank JRC branch, PW54, the relationship manager for the accused's personal Am-Islamic accounts, PW47, the bank's manager at its credit card division were all definitive in stating there were no complaints, inquiries let alone legal action initiated by the accused in relation to any of the many transactions in his personal accounts, including the two credit card accounts.

[1061]Not only that. His subsequent conduct further incontrovertibly shows his resoluteness in not making any inquiries or actions to clarify or remedy any

issues. This was the situation after PW37 and PW49 personally told the accused in the middle of July 2015 of the true nature of the transactions which they by then knew originated from SRC.

[1062]The objective factual circumstances — the evidence on his involvement in SRC in respect of the offences under the MACC Act and the Penal Code; the evidence that the RM42m is by any measure totally disproportionate to his remuneration even as the Prime Minister; the evidence on money trail on his spending before and after receipt of the RM42m, including the very large sums and high frequency of transactions; the evidence of the absence of inquiry or any clarifying or remedial action on his part on these transactions even after being told of the truth, and despite the 1MDB related controversy being made public first in *Sarawak Report* and *Wall Street Journal* in July 2015, his specific instructions to the bank to transfer RM32m (P277), the BBM evidence on conversations between Joanna Yu (PW54) and Jho Low (P578), the role of Nik Faisal and Datuk Azlin in the transfers, and his own affirmation in an affidavit admitting knowledge of the source of the RM42m very much more than abundantly justifies this court to draw the reasonable inference, inescapable and irresistible, that the accused must not only have known or had reasonable suspicion that the RM42m was proceeds of unlawful activity (s 4(2)(a)), but also that the accused had at the same time wholly failed to have made reasonable enquires to ascertain whether it was proceeds from unlawful activity (s 4(2)(b)).

[1063]As such, the accused had also, despite the factual objective circumstances, plainly failed without reasonable excuse to take reasonable steps to ascertain whether or not the RM42m was the proceeds of an unlawful activity, within the meaning under s 4(2)(b).

The Arab donation story

[1064]In addition to the factual objective circumstances referred to above which give rise to the finding that the accused had also failed without reasonable excuse to take reasonable steps to ascertain whether or not the RM42m was the proceeds of an unlawful activity under s 4(2)(b), the other aspect of the objective factual circumstances concern more specifically to the alleged Arab donations or the personal donations from King Abdullah. The defence of the accused is that he had honestly belief that the SRC funds of RM42m which flowed into his personal accounts were part of the Arab donation monies.

[1065]As has been discussed earlier in the section on CBT, evidence shows the accused returned a massive USD620m in 2013 to the outfit which made the transfer to his accounts but the accused accepted a further RM49m from

alleged Arab sources barely a year later. Furthermore the bank statements have been shown to record that by October 2014 the alleged donations from the remittances in 2011–2013 had very substantially been used up. The RM49m that arrived later in 2014 could not have been the reason why the accused thought that the SRC's RM42m was part of the Arab donation monies of RM49m since during that period in late December 2014 and February 2015 the accused had spent almost RM136m. Thus even on this aspect, the mental element of the accused has been proved under both of s 4(2)(a) and s 4(2)(b) of the AMLATFPUAA.

[1066]The accused was then the serving Prime Minister. There was much public controversy on the matter. Yet he chose not to lodge any report with the bank or the authorities, when that would have been the very first and obvious thing reasonably expected by all and sundry to have been undertaken by any incumbent of not just an important public office, but the highest executive and elected position in the nation, as the Prime Minister and the Minister of Finance, who is publicly accused including in the international media, of committing financial crimes. The doctrine of wilful blindness, as explained in *Azmi bin Osman v Public Prosecutor and another appeal*, readily applies in the instant case, imputing knowledge on the accused who so manifestly had his suspicion aroused to the point that despite the glaring need to inquire further, he deliberately chose not to make those inquiries.

[1067]And it is also part of the doctrine of wilful blindness that the accused decided against obtaining the final confirmation because he wished in the event to be able to deny knowledge. It does therefore appear to me compelling an inference that that accused had deliberately chosen not to do anything regarding the matter as he knew that this would expose his involvement in a criminal activity. This more than amply proves the mental element of the accused in the three money laundering charges.

[1068]Accordingly, in respect of the element of knowledge, given the evidence stated earlier I find that the accused knew that the RM42m was proceeds of an unlawful activity under s 4(2)(a) or in the best case for the defence, the accused was wilfully blind in that he had failed without reasonable excuse to take reasonable steps to ascertain whether or not the RM42m was the proceeds of an unlawful activity under s 4(2)(b).

Decision on the three money laundering charges at the end of the prosecution case

[1069]As such on a maximum evaluation of all evidence, I find that all the ingredients of the money laundering offence under s 4(1)(b) of the AMLATFPUAA in the three charges have been proved.

Challenge on admissibility of certain documents

[1070]A key issue raised by the defence at the end of the prosecution case is its challenge on certain documents, most of which have been admitted in evidence by the court and marked as exhibits. In this respect, the defence has classified the documents into the following categories, and submitted that these documents are not admissible for non-compliance with the provisions of the Evidence Act 1950:

(a) where the primary or original documents have not been produced (Class 1); P57–P60, P57(33), P57(31–32), P58 (4–5), P59(29–30), P59(35), P60(1), P60(5), P60(10), P60(17), P60(19–20), P635, P277, P501, D534, D535, P530(1–11), P530A, P497, ID499, ID504, ID505 and ID506;

(b) where the makers were not called (Class 2) P530(1–11);

(c) where there is no evidence of execution of the same (Class 3) P57(25), P57(29), P57(30), P58(7), P58(8), P59(31), P59(32), P59(33), P59(35A), P60(6–7) and P510; and

(d) Class 1, Class 2 and Class 3 documents obtained by the investigating officer (PW57) during the course of the investigation.

[1071]The position of the defence is that these documents are inadmissible because they do not adhere to the provisions of the Evidence Act 1950. Significantly it is submitted that reliance cannot be made by the prosecution to admit the documents under s 41A of the MACC Act or s 71 of the AMLATFPUAA because the *non obstante* clauses in these statutes, according to the defence, do not exclude the application of the Evidence Act 1950.

[1072]The defence further submits that s 71 of the AMLATFPUAA is also not applicable since the said classes of documents were seized by PW57 pursuant to ss 30 and 35 of the MACC Act without reliance on any provision of AMLATFPUAA.

[1073]The defence also contends that s 41A of the MACC Act is inapplicable as this provision only came into operation on the 1 October 2018 and has no retrospective effect.

[1074]The prosecution rejects these arguments, and submits in reply that almost all of these documents have been marked as prosecution exhibits (P) and defence exhibits (D) during the course of the trial and are therefore admissible. The prosecution argues that no positive objection had been taken during the production of these documents at the material time, namely, the time of production, and further that the court had already decided that these

documents are admissible when this court marked these documents as 'P' and 'D' respectively. It is therefore not open to the defence to object to the admissibility at this stage of the trial. The prosecution accepts that only documents marked for identification (ID) specifically ID499, ID504, ID505 and ID506 should remain as ID if there is no evidence to change their status to become prosecution or defence exhibits.

[1075]It is useful to first refer to the provisions of the Evidence Act 1950 which govern the admissibility of these documents.

[1076]The Class 1 documents are those which originals were not produced. These Class 1 documents several non-original documents which include, among others, on account opening forms which carry the signatures of the accused and contained in folders retrieved from AmBank JRC branch (P57–P60), the instruction letter dated 24 December 2014 on the transfers of RM32m from Accounts 880 and 906 to PBSB and PPC document (P277), the SRC's shareholder minutes said to be signed by the accused as MOF Inc, and the minutes of meeting held on 7 September 2011 between Nik Faisal and the accused as the Prime Minister (ID499).

[1077]It is well-entrenched in the law that under s 64 of the Evidence Act 1950, documents must be proved by primary evidence except in cases where secondary evidence may be given. Pursuant to s 62 primary evidence means the document itself is produced for the inspection of the Court. This accords with the best evidence rule and means the original of the document, which includes a document produced by a computer. Secondary evidence includes, for present purposes, under s 63(b), copies made from the original by mechanical processes such as photocopied documents. The argument of the defence is that these Class 1 documents are photocopied version of the originals which were not produced.

[1078]There are two threshold requirements that must be satisfied before any secondary evidence can be admitted. The first is that the document must be established to be secondary evidence. Section 63 provides as follows:

> 63 Secondary evidence
>
> Secondary evidence includes —
>
> (a) certified copies given under the provisions hereinafter contained;
>
> (b) copies made from the original by mechanical processes, which in themselves ensure the accuracy of the copy, and copies compared with such copies;
>
> (c) copies made from or compared with the original;

(d) counterparts of documents as against the parties who did not execute them;

(e) oral accounts of the contents of a document given by some person who has himself seen or heard it or perceived it by whatever means.

[1079]In other words in order to be admitted as secondary evidence, there must first be evidence that for example under s 63(b) of the Evidence Act 1950 the document was copied by way of mechanical processes from the original document or that the copy was made from or compared with the original under s 63(c).

[1080]Only after the first threshold is established can regard be had to s 65(1) to justify admission of the document as secondary evidence in any of the circumstances stated therein, as follows:

65 Cases in which secondary evidence relating to documents may be given

(1) Secondary evidence may be given of the existence, condition or contents of a document admissible in evidence in the following cases:

(a) when the original is shown or appears to be in the possession or power —

(i) of the person against whom the document is sought to be proved;

(ii) of any person out of reach of or not subject to the process of the court; or

(iii) of any person legally bound to produce it,

and when after the notice mentioned in section 66 such person does not produce it;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot for any other reason not arising from his own default or neglect produce it in reasonable time;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of section 74;

(f) when the original is a document of which a certified copy is permitted by this Act or by any other law in force for the time being in Malaysia to be given in evidence;

(g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection.

[1081]Thus, once established as secondary evidence, in order to render it admissible, further evidence is necessary to show that the secondary evidence comes within any of the circumstances listed in the above-stated s 65(1). For present purposes it appears that reliance may potentially only be had on s 65(1)(c) in that the original has been destroyed or lost, or when the prosecution cannot for any other reason not arising from his own default or neglect produce the same in reasonable time.

[1082]As such in this case, in relation to the documents concerning account opening in P57–P60, the testimonies given by Uma Devi (PW21), the JRC branch manager, Joanna Yu (PW54) and the investigating officer (PW57) does not seem to establish that the same should properly be held as secondary evidence. This is because among others, PW21 only became the JRC branch manager on 1 July 2015, literally only days before the raid was conducted at the branch by the BNM investigation team. PW21 also said that as to documents where there were no originals in the folders, she did not know where the originals were.

[1083]Further the investigating officer (PW57) did not investigate who provided the documents to the bank, when they were provided, to whom they were provided and how these documents came to be contained in the folders. He did not establish whether any of these documents were in fact original with actual signatures as compared to copies. Despite retrieving sample signatures from the accused, PW57 did not investigate the authenticity of the documents and the signature which purported to bear that of the accused were not investigated. No chemist report on any of these documents was ever requisitioned by MACC.

[1084]And as for Joanna Yu (PW54), she did not open or prepare the folders and did not know where these folders or documents came from, and she or her relationship management team never received any documents from the accused directly. There were also documents with the accused's signature without dates filled up, and on the documents which were not originals there was a possibility that hard copies were never received by her. She also testified that the people she was in communication with including Jho Low and Nik Faisal were in the habit of using e-signatures and email signatures, and further that there is a possibility that the signatures of the accused have been 'cut and paste'.

[1085]I would be inclined to agree with the contention of the defence that there is lack of evidence to establish that the documents in Class 1 are secondary evidence within s 63 of the Evidence Act 1950 as the provenance of these documents cannot be shown by evidence. And further that there is also insufficient evidence to permit reliance on any of the situations under s 65(1)

of the same Act, for no evidence has been adduced to suggest that the originals have been lost or destroyed or for any reason cannot be produced.

[1086]For the instruction letter in exh P277, PW21 agreed that it is also a softcopy version and she had not seen the hardcopy. PW24 from the remittance department which received P277 from JRC branch too did not know how the document was received by AmBank.

[1087]Importantly, however, Joanna Yu (PW54) agreed that she in fact drafted P277 on the instructions of Jho Low, initially for Nik Faisal's execution. This is recorded in the BBM messages (P578) which also shows that on 24 December 2014, PW54 notified Jho Low that Nik Faisal had no authority to sign the same, and that only the account holder (the accused) could do so. This then was on the same day sent by Nik Faisal to PW54 and appeared to have been duly executed by the accused. The testimony of PW57 too confirmed that his investigation shows that P277 was prepared by PW54 although he was not sure if anyone saw the execution of the document by the accused. PW57 also did not examine the BBM messages (P578) on this issue.

[1088]The evidentiary requirements for P277 to be admitted as secondary evidence have not been met in that there is no evidence of whether an original P277 even exists and that there has been no investigation to authenticate this document. But the fact that PW54 confirmed having prepared the document which was produced in court and shown to her must be taken to mean that the original exists and her confirmation is sufficient to satisfy the requirement that what was shown was the same as the original. However the prosecution still cannot pass muster the second threshold of admitting this piece of secondary evidence because there is absolutely no evidence from any of the witnesses like the investigating officer as to why the original could not be produced.

[1089]The other group of documents in Class 1 are the shareholder minutes issued by MOF Inc in exhs P501, D534 and D535 all dated 17 February 2012. These are minutes of the corporate representative of holding company under s 147(6) of the Companies Act 1965. I find these documents cannot be admitted as the truth of the contents have not been proved by way of primary evidence, or acceptable secondary evidence.

[1090]P501 itself which is dated 17 February 2012 dealt with among others with the first financing of RM2 billion which in fact had been disbursed earlier on 29 August 2011, and the board of SRC had already on 14 September 2011 resolve to utilise the same by way of shareholder advance. P501 also deals with the approval to procure the second financing of RM2 billion. Yet no originals were not produced and no explanation was provided by any of the prosecution witnesses.

[1091]On the evidence of the prosecution witnesses, similar analysis and conclusion applies for the other Class 1 documents, namely P530(1)–(11) and P530A which mainly contain the minutes of corporate representatives of MOF Inc for 1MDB dated 11 August 2011, as well as P497 which comprises among others a directors' circular resolution of 1MDB dated 11 October 2011, and a minute by the accused for MOF Inc which referred to 'Operationalisation of SRC International Sdn Bhd' relating to an EGM deemed to be held on 11 August 2011 but dated 15 September 2011.

[1092]No verification was done by the investigating officer (PW57) with the company secretaries of 1MDB or SRC on any of the company minutes and resolutions. Datuk Suboh (PW42) claimed never to have seen any of the shareholder minutes of 1MDB and SRC and never signed any document with the shareholder minutes in front of him.

[1093]The other Class 1 document is the said minutes of meeting between the accused and Nik Faisal dated 7 September 2012. This was introduced through PW39 and served on the defence only on 17 May 2019, more than two months after commencement of trial. Again ID499 is not in the secretarial document of SRC, no verification was done with the company secretary and no other director of SRC cited ID499 during investigation.

[1094]In respect of the Class 2 documents, where the maker was not called, the relevant document in question are the same P530(1)–(11) and its further copy, P530A. This was tendered without any authentication from the company secretary of 1MDB or from the author of the covering letter. Nor was any statement taken from the recipient of the letter.

[1095]The law is that in order to establish truth of the contents of any document, the said document must be testified by the maker of the document. Failing this, there is no proof as to the truth of the contents of the document which must remain as hearsay.

[1096]This position was made clear in the case of *Allied Bank (Malaysia) Bhd v Yau Jiok Hua* [1998] 6 MLJ 1 where Augustine Paul J (as he then was) held thus:

> It is settled law that where a document is sought to be proved in order to establish the truth of the facts contained in it, the maker has to be called (see *R v Gillespie* (1967) 51 Cr App Rep 172; *R v Plumer* (1814) R & R 264; *Hill v Baxter* [1958] 1 QB 277; *R v Moghal* (1977) Crim LR 373). Non-compliance with this rule will result in the contents of the documents being hearsay. The evidential effect of a document which has not been properly proved was described by Abdoolcader J (as he then was) in *Public Prosecutor v Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 MLJ 180 at p 183 in the following terse terms:

> It is necessary to refer to certain exhibits which have been put in the course of these proceedings for identification but have not in fact been proved as they should have been and are accordingly not exhibits in the strict sense and cannot therefore form part of the record in this case, namely, D41 and D43 which were both put in for identification only and which are the audited accounts and annual report of the Bank for the years 1973–1974 and 1972 respectively. As these two exhibits have not been proved and properly admitted as such, they must in the ultimate analysis be discounted and I shall accordingly disregard references to them and also all oral testimony as well adduced in relation thereto ...

[1097]The Class 3 documents as listed above, which include some in Class 1 relate to those which carry the signature of the accused where according to the defence no proof of execution has been established. Section 67 of the Evidence Act 1950 is pertinent and says this:

> 67 Proof of signature and handwriting of person alleged to have signed or written document produced
>
> If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting shall be proved to be in his handwriting.

[1098]As such other than being in non-original form, the many documents which appear to carry the signature of the accused which includes P510, the shareholder minute by MOF Inc on the amendment to the M&A to provide for the position of advisor emeritus, as well as the various letters taken from the folders of the bank accounts (some already in Class 1) must also additionally be subject to prior proof of execution before consideration of admissibility as secondary evidence.

[1099]The High Court in *Razak bin Abu v Public Prosecutor* [2008] 4 MLJ 248 explained the law on this subject as follows:

> [28] In *State (Delhi Administration) v Pali Ram* AIR 1979 Supreme Court 14, Sarkaria J considered the various sections of the Indian Evidence Act which contains provisions similar to that of Malaysia. He held as follows in relation to the proof of the handwriting of a person:
>
> > ... Just as in English law, the Indian Evidence Act recognises two direct methods of proving the handwriting of a person:
> >
> > (1) By an admission of the person who wrote it
> >
> > (2) By the evidence of some witness who saw it written.
>
> These are the best methods of proof. These apart there are three other modes of proof by opinion. They are:
>
> (i) By the evidence of a handwriting expert (Section 45)

(ii) By the evidence of a witness acquainted with the handwriting of the person who is said to have written the writing in question. (Section 47)

(iii) Opinion formed by the court on comparison made by itself. (Section 73)

All these three cognate modes of proof involve a process of comparison. In mode (i) the comparison is made by the expert of the disputed writing with the admitted writing of the person who is said to have written the questioned document. In (ii) the comparison takes the form of a belief which the witness entertains upon comparing the writing in question with an exemplar formed in his mind from some previous knowledge or repetitive observance of the handwriting of the person concerned. In the case of (iii), the comparison is made by the Court with the sample writing or exemplar obtained by it from the person concerned ...

[29] It is notable however that the Indian court went on to caution the utilisation of s 73 of the Indian Evidence Act which is similar to the Malaysian s 73 in the following terms:

... Although there is no legal bar to the judge using his own eyes to compare the disputed writing with the admitted writing even without the aid of the evidence of any handwriting expert, the Judge should, as a matter of prudence and caution, hesitate to base his finding with regard to the identity of a handwriting which forms the sheet-anchor of the prosecution case against a person accused of an offence, solely on comparison made by himself. It is therefore, not advisable that a judge should take upon himself the task of comparing the admitted writing with the disputed one to find out whether the two agree with each other; and the prudent course is to obtain the opinion and assistance of an expert ...

[30] And as for the role of a handwriting expert, that too was carefully circumscribed by the Indian court as follows:

... It is not the province of the expert to act as judge or jury. As rightly pointed out in *Titli v Jones* ILR 56 All 428; AIR 1934 All 273 the real function of the expert is to put before the court all the materials, together with reasons which induce him to come to the conclusion, so that the court, although not an expert, may form its own judgment by its own observation of those materials. Ordinarily, it is not proper for the court to ask the expert to give his finding upon any of the issues, whether of law or fact, because, strictly speaking such issues are for the court or jury to determine. The handwriting expert's function is to opine after a scientific comparison of the disputed writing with the proved or admitted writing with regard to the points of similarity and dissimilarity in the two sets of writings. The court should then compare the handwritings with its own eyes for a proper assessment of the value of the total evidence ...

[1100]The defence submits therefore that these documents are inadmissible because the prosecution has failed to prove their execution given that not a single person testified that the accused actually signed these documents before

them, none of the witnesses were established to have sufficient acquaintance with the accused's signature to be able to prove the same and that there was no chemist report though circumstances justified it be requisitioned and produced.

[1101]Now I must state that the submissions of the defence on the non-satisfaction of these relevant documents specified as Classes 1, 2 or 3 with the applicable law of evidence are valid, as supported by what the prosecution witnesses testified as to what had been done or that in this case, mostly, not done vis a vis primarily the requirements on the pre-condition of admitting secondary evidence. In fact the prosecution did not even see if fit to reply to any of the arguments of the defence on the specific documents and the provisions of the Evidence Act 1950.

[1102]Instead the prosecution's response to the admissibility argument is twofold and more generally formulated. First it contends that the documents, categorised as Class 1, Class 2 and Class 3 are all admissible documents per se subject to the fulfilment of requirements of the Evidence Act 1950. The defence, according to the prosecution is merely challenging the irregularity or inadequacy of the method or mode of proof for the said documents.

[1103]The prosecution's position is that in this context, there are broadly two classes of documents. First is where the objection is that the documents sought to be proved is ab initio inadmissible in evidence. In this situation the objection on admissibility can be taken at any stage because inadmissible evidence does not become admissible by reason of the failure to object. But the prosecution maintains that in the instant case, the objection raised by the defence does not dispute the admissibility of the documents but instead is directed towards the mode of proof by alleging the same to be irregular or insufficient, and that in such situation the objection on the admissibility should be taken before the document is marked as an exhibit and admitted to the record.

[1104]The prosecution asserts that the documents in Classes 1, 2 and 3 fall within this second category. As such, the defence's objection should have been made at the first available opportunity that is when the documents were first produced to be marked as evidence and not after the document has been marked as an exhibit. Inadmissible evidence does not remain inadmissible in this category of documents. It recognises the adversarial system in our criminal procedural law, particularly when an accused is represented by counsel at trial, as in the instant case. The obligation is on the accused or counsel to object. The entire documents now contended by the defence to be inadmissible fall under this category.

[1105]The Privy Council the case of *Gopal Das And Anr vs Sri Thakurji And*

Ors AIR 1943 PC 83; AIR 1936 All 422 held, on this subject:

> ... The endorsement 'admitted against the Plaintiffs' is in the form generally employed by the trial Judge under O 13 R 4 for documents tendered by the defendants just as the Plaintiffs' documents are marked 'admitted against the defendant'. The endorsement means that the document is admitted in evidence as proved. Where the objection to be taken is not that the documents is in itself inadmissible but that the mode of proof put forward is irregular or insufficient it is essential that the objection should be taken at the trial before the documents is marked as an exhibit and admitted to the record. A party cannot lie by until the case comes before the Court of Appeal and then complain for the first time of the mode of proof. A strictly formal proof might or might not have been forthcoming had it been insisted on at the trial. In the present instance, it does not appear that the objection was taken at the proper time or that it would been of any avail had it been taken.

[1106]The Indian Supreme Court in *RVE Venkatachala Gounder v Arulmigu Viswesaraswami & VP Temple & AR* AIR 2003 SC 4548 ruled:

> *... Ordinarily an objection to the admissibility of evidence should be taken when it is tendered and not subsequently*. The objections as to admissibility of documents in evidence may be classified into two classes: (i) an objection that the documents which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as 'an exhibit', an objection as to its admissibility is not excluded and is available to be raise even at a later stage or even in appeal or revision. *In the latter case, the objection should be taken before the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit.* (Emphasis added.)

[1107]Similarly the High Court in *Nachiappin v Lakshmi Ammal* [1966] 2 MLJ 95 had also ruled that any objection as to the irregularity or insufficiency of the mode of proof should be taken before the document is marked as an exhibit and admitted to the record. Raja Azlan Shah J (as HRH then was) stated instructively in the following terms:

> Secondly, it was urged on behalf of the appellant that the learned magistrate erred in law in admitting the photographs as evidence without the production of the originals or calling the photographer who took them. I was informed that both parties were represented in the court below. The photographs had been admitted as exhibit P1 without any objection and in fact there was no record of any objection by appellant's counsel at that stage. A passage from the judgment of the Privy Council case of *Gopal Des Sri Thakurgi* AIR 1943 PC 83 at p 87 is a sufficient answer to counsel's argument. It reads: 'Where the objection to be taken is not that the

document is in itself inadmissible but that the mode of proof put forward is irregular or insufficient, it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record. A party cannot lie by until the case comes before a Court of Appeal and then complain for the first time of the mode of proof'. That passage was applied and followed by the Court of Appeal in *Suppiah Ponnampalam* [1963] MLJ 202 at p 203.

[1108]In other words, the prosecution submits that the defence's failure to raise a clear and forceful challenge when the documents was presented to be marked as exhibits should be considered to mean that the defence has agreed to or waived the improper manner in which the evidence of the documents were produced.

[1109]In my judgment while the prosecution has correctly referred to the relevant authorities on this subject, its application to the facts and situation in the instant case is somewhat inaccurate. I say so for two reasons.

[1110]First, in my view, all the documents in Class 1 to Class 3 are in itself inadmissible and the objections can therefore be raised at any time. The prosecution has erroneously categorised them because the absence of originals and of the maker would go directly to the issue whether the documents sought to be proved are itself admissible in evidence. Generally, these documents came into the possession of the relevant witnesses without the originals. The witnesses too have no personal knowledge of the contents of most of the documents. The documents were also not sent by the investigating officer to the chemistry department to confirm the veracity of the signatures of the accused.

[1111]As such the objections raised in Class 1 to Class 3 in fact would fall within the category of documents which are inadmissible in itself. And not the other category as contended by the prosecution.

[1112]I need not reiterate that the mere marking of these documents does not render the same admissible if the evidentiary basis has not been sufficiently met. This has been a well-established rule, as affirmed by the Supreme Court in *KPM Khidmat Sdn Bhd v Tey Kim Suie* [1994] 2 MLJ 627; [1994] 3 CLJ 1, as is manifest from the following passages from the judgment of Mohamed Dzaiddin SCJ (later Chief Justice):

In order for the court to rely on the summary of accounts (pp 117–121 appeal record), the respondent must satisfy the court that his record book was lost to enable secondary evidence relating to the said book to be given. The relevant part of s 65(1) states:

(1) Secondary evidence may be given of the existence, condition or contents of a document admissible in evidence in the following cases:

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(a) ...

(b) ...

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot for any other reason not arising from his own default or neglect produce it in reasonable time;

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On the principle and scope of s 65, we respectfully rely on the commentary in *Sarkar on Evidence* (at p 964):

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It has been seen that the contents of a document must be proved by the production of the original document and secondary evidence of it is not generally admissible (s. 64). There are exceptions to the rule and this section states the various class of cases in which secondary evidence relating to documents may be given. The principle is that so long as the original exists and is available, it being the best evidence, must be produced. If it cannot be had on account of its loss, destruction, detention by the opponent, or third person who does not produce after notice, physical or legal irremovability, or any other cause, secondary evidence is admissible. Porter J in *Thomas v T* 1 La 166, 168 (Am):

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> (The rule) is only another form of expression for the idea that when you lose the higher proof, you may offer the next best in your power ... The rule does not mean that men's rights are to be sacrificed and their property lost because they cannot guard against events beyond their control; it only means that, so long as the higher or superior evidence is within your possession or may be reached by you, you shall give no inferior proof in relation to that.

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At p 966, it is further stated:

> (But) secondary evidence of an ordinary document is admissible only when the party desirous of admitting it has proved that he has not possession or control of it and further that he has done what can be done to procure the production of it. He has to account for the non-production in one of the ways indicated in this section (*Krishnakishori v Kishori* 14 IA 71; 14 C 486; *Shambati v Jogo* 29 C 749; *Bhubaneswari v Harisaran* 6 C 720). When original account books are available copies are not admissible (*Jainarain v Zubeda* A 1972 A 494).

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Exceptions (a) and (c) rest upon the principle that a party tendering a copy has done all that lies in his power to produce the original.

Thus, basically, secondary evidence of the contents of a document is inadmissible, until the non-production of the original is first accounted for, so as to bring it within one or other of the cases provided for in the section (*Krishnakishori v Kishori*; *Bhubaneswari v Harisaran,* ante). In the present case, based on the evidence of the respondent which we have highlighted above, we are satisfied the respondent had not shown that the non-production of the record book had been satisfactorily accounted for so as to bring it within s 65(1)(c) of the Act. The respondent also had

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led no evidence to suggest that the non-availability of his record book was through no fault of his. A

[1113]Secondly, it is inaccurate to state that no objections were taken by the defence when the documents were sought to be admitted into evidence. It may well be true that the defence did not launch any forceful challenge in objecting to any of the documents. But this is only because the defence had at each appropriate juncture raise objections or gave notice of the same when the documents were sought to be marked or through cross-examination of the witnesses who testified on the same. Significantly, prior to the testimony of the investigating officer (PW57), the defence had also furnished to the prosecution a list of documents on which objections were being maintained. It is my understanding that parties had agreed that the issue of admissibility of the documents would be taken together at the close of the prosecution's case. B C D

[1114]Furthermore, it is also trite that if the prosecution wishes to rely on the truth of the contents of the documents (as opposed to merely to the documents being in existence) the burden is on the prosecution to properly prove the documents. This was made clear in the Court of Appeal decision in *Agromate (M) Sdn Bhd v KTS Trading Sdn Bhd* [2017] MLJU 1815, where it was thus held: E

> [29] The CCIC Report and CCM Agrimax test had been marked as exhibits respectively. However, if the plaintiff had wanted to rely on the truth of their contents, they need to be proved according to the law. Section 60(1)(d) of the Evidence Act 1950 states that direct evidence must be given in regard to the opinion of any person. In *Yonsufali v State of Maharashtra* AIR 1968 SC 147, the Supreme Court of India has held that although the contemporaneous photographs of the relevant incident are held to be admissible, the accuracy of such photographs must be proved by calling the photographer who has direct knowledge of its accuracy. In *Mohd Nazari bin Ab Majid v Tan Keo Hock & Anor* [1999] 1 CLJ 601, Augustine Paul JC (as he then was) opined that a document can be admitted under any label but if the party wants to rely on the truth of its contents when it is disputed by other party, it needs to be proved according to law. F G
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> [30] In this instant appeal, if the plaintiff had wanted to rely on the test results, they could have subpoenaed the maker of the CCIC Report and chemist from CCM Agrimax to testify. They did not. As the results were not agreed to or accepted by either party, no weight ought to be given to them. H

[1115]The other argument advanced by the prosecution in reply to the challenge raised by the defence is that the documents should be admissible since the defence had cross-examined the relevant witnesses on these documents. Thus, in *Jet Holding Ltd and Others v Cooper Cameron (Singapore) Pte Ltd and Another and Other Appeals* [2006] 3 SLR (R) 769, the Singapore Court of Appeal held that when a party did not object to the admissibility of a I

document he cannot object to the admissibility of the document later especially when he had cross-examined the opponent on the impugned document. The court stated thus:

> [51] We are therefore of the view that whilst, as an important point of departure, a party seeking to introduce documents into evidence ought to comply with the provisions in the Evidence Act, if these documents are in fact marked and admitted into evidence without that party in fact satisfying the requirements in the Evidence Act and where there has been no objection taken by the other party at that particular point in time, then that party cannot object to the admission of the said documents later. This last-mentioned proposition applies, of course, in an a fortiori manner when the party who had not objected to the introduction of the documents subsequently cross-examines the relevant witnesses on these documents in an attempt to discredit the truth of the contents stated therein.

The Indian Supreme Court also takes the same view in the case of *Ram Janki Devi & Anr v M/S Juggilal Kamlapat* AIR 1971 SC 2551 in that once the document is used in cross-examination, then the document gets proved and can be read in evidence.

[1116]I do not think however this second line of argument of the prosecution in reliance on Indian and Singaporean case laws on the relevant documents having already been subject cross-examination to justify admission into evidence can be said to able to override the established position in this country, as exemplified in the authority of the Supreme Court in *KPM Khidmat Sdn Bhd v Tey Kim Suie* [1994] 2 MLJ 627; [1994] 3 CLJ 1.

[1117]Notwithstanding the finding that these documents were not properly proved under Evidence Act 1950, two important observations may be made.

[1118]The first is that on the matter of the method of proving execution by the accused of many of the documents categorised in Class 1, 2 and 3 documents including the instructions in P277, the shareholder minutes of 1MDB and SRC as well as letters taken from the bank, the signature may be proved by circumstantial evidence. Section 67 does not state that the signature must be proved by a person who actually saw another affixing his signature.

[1119]Thus in *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232 it was argued that the signature on a letter by the appellant must be proved to be that of the appellant. Abdoolcader FJ, for the Federal Court, ruled that the signature can be proved by circumstantial evidence, and stated as follows:

> As to the ownership of the pistol (P88) by the 1st appellant the prosecution relies on the evidence of SAC Yahya and Inspector Rashid and P16 which is the pistol licence and P17A which is a letter written by the 1st appellant to SAC Yahya. Mr Jagjit

Singh however contends that the handwritten contents of P16 are hearsay and that although the licence itself is primary evidence it does not reflect the truth of its contents, and relies on the decision of the House of Lords in *Myers v Director of Public Prosecutions* [1980] 2 MLJ 273 and related cases. As to that we would say that in *Myers (ante)* the microfilm records were the only evidence, and in some cases the presumption of regularity will permit the admission of a document without proof of its authenticity and reliance can also be had on the circumstances surrounding its genesis (*Pamplin v Gorman* (1980) Cr LR 52).

The licence (P16) was issued pursuant to the provisions of ss 3 and 4 of the Arms Act, 1960 in the form prescribed by the Arms Licensing Regulations, 1961, and s 4(5) of the Act clearly makes the licence an original document, the particulars whereof are entered in a register kept by the Chief Police Officer of a State. It bears the 1st appellant's photograph and identity card number which tallies with that appearing in his statement to the police (P119) and also contains the serial number of the pistol which is that of P88. The pistol (P88) together with the magazine with five live bullets (P15), the licence (P16) and a clutch bag (P14) were handed by PC Mohd Sani bin Mohd Shariff (called by the defence as DW27), the first appellant's police bodyguard, together with P17A to Inspector Rashid pursuant to a request by SAC Yahya in a telephone conversation with the first appellant, and SAC Yahya was asked by the first appellant if he had received the pistol when he went to see the latter in his office subsequently. All this is borne out by the evidence adduced and the disposition and custody of these exhibits until their production in court were properly accounted for and there was accordingly no break in the chain of evidence (*Su Ah Ping v Public Prosecutor* [1980] 1 MLJ 75), and the fact that PC Sani was not called by the prosecution to testify on this aspect did not constitute any break in the chain. On the evidence P16 was the 1st appellant's licence and no proof of its contents was necessary.

It is also contended on behalf of the 1st appellant that P17A is documentary hearsay and that the handwriting and signature therein must be proved to be that of the 1st appellant. The signature or handwriting in a document may be proved by circumstantial evidence if that irresistibly leads to the inference that the person in question must have signed or written it (Baru Ram v Prasanni AIR 1959 SC 93) *and a document can also be regarded as evidenced by its contents and the internal evidence afforded by the contents can be accepted as authentication as when it states facts and circumstances which could have been known only to the person to whom the authorship is attributed. The execution or authorship of a document is a question of fact and may be proved like any other fact by direct as well as circumstantial evidence which must be of sufficient strength to carry conviction* (*Krishnabiharilal v State* AIR 1956 MB 86 pp 90–91). Having regard to the contents of P17A and the letterhead of the Ministry whose portfolio the first appellant was then holding as Minister, the evidence of SAC Yahya and inspector Rashid which confirmed the receipt of the pistol and the licence and the enquiry by the first appellant of SAC Yahya as to whether he had received the pistol sent through PC Sani together with the ammunition and P17A, the irresistible conclusion is that the handwriting and signature in P17A is that of the first appellant and that he wrote that letter.

There is accordingly in the circumstances we have discussed no gap regarding the handing over by and taking possession of the pistol (P88) from the first appellant

A and the evidence clearly evinces that this was the pistol he owned and the fact that the prosecution did not call PC Sani did not affect the position or create any gap in the chain of evidence. (Emphasis added.)

B **[1120]**In the instant case circumstantial evidence could similarly lead to the irresistible conclusion that the signatures on the documents stated as in the Classes 1–3 are that of the accused. For example as for the many shareholder minutes of 1MDB and SRC which carry the signature of the accused as MOF Inc, first, these documents were received by the Chairman of SRC (PW39) and secondly, in respect of some, were also referred to in the minutes of the C meetings of the board of directors of SRC. Thirdly, they were acted upon by SRC. Fourthly, there is no evidence of any complaints by the accused that SRC acted on unauthorised shareholder minutes of MOF Inc. Fifthly, evidence by PW39 and PW42 is unequivocal that Nik Faisal was the link person between D the board of directors and the Prime Minister.

[1121]Sixthly, Nik Faisal regularly provided updates or apprised the directors on actions to be taken as decided by the accused. Seventhly, PW39 testified to being familiar with the signature of the accused, given his previous dealings E with the accused especially during his stint as the CEO of the Pilgrims Fund Board (Lembaga Tabung Haji). Eighthly, PW57 testified that the accused himself when giving his statement to MACC never denied that he had signed any of these documents which explained why PW57 did not seek the report on handwriting from the chemist department.

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[1122]The situation is not much different in respect of P277, the instructions by the accused to transfer RM32m to PBSB and PPC. First, P277 was received and acted on by Am-Islamic Bank. Secondly, PW54 actually agreed that she drafted the instructions for the accused to execute. Thirdly, there are no G complaints by the accused that AmBank unlawfully acted on unauthorised instructions to transfer the RM32m out of his own Accounts 880 and 906. There are no complaints then at the material time nor at any time subsequently until after PW54 has finished with her testimony. Fourthly the BBM messages evidence (P578) too confirmed the preparatory drafting work on P277 was H done by PW54. Sixthly, nor are there complaints from PBSB and PPC upon their receipt of the RM27m and RM5m, respectively.

[1123]Seventhly, PW57 testified that the accused himself when giving his statement to MACC never denied that he had signed P277. Eighthly, P277 is I a document which contents are specifically on the detailed instructions for the transfers of RM27m and RM5m to the accounts of PBSB and PPC from Accounts 880 and 906 respectively. The accused ought to have surely denied at the very first opportunity when shown this document if the contents were unfamiliar or alien to him. But he did not.

[1124]For all the documents in question, in fact the accused only started to deny that the signatures were his in the course of trial. This is despite the documents having been supplied to the defence under s 51A of the CPC way before commencement of the trial. And even the defence statement of the accused under s 62 of the MACC Act does not allude to any allegation of forgery or fabrication of documents.

[1125]The other key observation is this. Now, even if these documents cannot be admitted for lack of evidentiary adherence to the need for the original version or for non-fulfilment of the pre-conditions to qualify as secondary evidence, or for the secondary evidence be allowed to be admitted in evidence or for lack of proof of due execution, it is strictly in this instant case unnecessary for any of these documents to be proved or admitted in evidence to establish any of the seven charges against the accused. None of these documents is mentioned in any of the charges.

[1126]Thus, whilst the shareholder minutes are especially relevant in the abuse of position charge and the CBT charges to show that the accused was giving instructions to the board of directors they are still only one piece of evidence to such effect. There are other facts and documents that can still be evaluated to establish the pertinent ingredients of having an interest in SRC and that the accused was a shadow director (and director under s 402A of the Penal Code) and that he was entrusted with dominion over the property of SRC. Even if they were not admitted, PW39's evidence is clear in his reliance as a director on the shareholder minutes issued by the accused as MOF Inc.

[1127]Some were even recorded in the minutes of the meetings of the board of SRC, as being referred to before the directors made decisions as the board. One was referred to in the paper for the deliberation of the Investment Panel of KWAP when SRC sought to apply for the additional RM2 billion financing. There were no complaints by the accused or any other party about the decisions taken by MOF Inc. as documented in these shareholder resolutions. The accused never denied he signed these shareholder minutes despite having the various opportunities to do so. He did not deny them when he was giving statement to MACC, when these documents were delivered to the defence under s 51A of the CPC, or even when the accused got the duty to deliver his defence statement under s 62 of the MACC Act.

[1128]Similar considerations can be said for the instructions in P277. Joanna Yu (PW54) drafted it. AmBank received the letter with the signature of the accused even though the original was probably never given to the bank. The bank executed the instructions. Bank records and money trail evidenced the transactions. Payments were made out of the personal accounts of the accused. Only the accused had the authority to instruct the transfers of funds out of his

accounts. Nik Faisal's mandate on the accused's accounts did not extend to instructing transfers out of any of the three accounts to another party's accounts. There were no complaints at all by the accused about the transfers of RM32m to PBSB and PPC. PBSB and PPC too did not deny they were entitled to the remittances into their accounts.

[1129]As has been set out earlier, there are also evidence of decisions concerning SRC taken by the accused with no involvement of the directors and which were not translated into shareholder minutes but conveyed to Nik Faisal. The meeting at PMO to reverse the investment panel decision on progressive release of the additional RM2 billion to SRC is only one example. In other words, there is sufficient evidence in the case against the accused in the seven charges even without the shareholder minutes or the instructions letter in P277.

[1130]In any event a complete answer to the challenge on the admissibility of the Class 1, 2 and 3 documents in my judgment are the provisions of s 71 of the AMLATFPUAA and ss 30(9) and 41A of the MACC Act.

[1131]The defence argues that case law authorities do not permit the non obstante clauses in these provisions to exclude the application of the provisions of the Evidence Act 1950. A true appreciation of these decisions means however that the non obstante clauses in s 71 of the AMLATFPUAA and ss 30(9) and 41A of the MACC Act are applicable to this case once the rules or laws which these sections seek to exclude are identified. It is important to realise that even though the said sections do not specify precisely what the rules or laws they intend to exclude, this does not and cannot mean that these provisions are of no utility, redundant and drafted in vain. The cases too clearly demonstrate that in order to invoke the application of the non obstante clauses in these statutes, a separate exercise must first be performed to identify the laws that these provisions intend to exclude.

[1132]Both the prosecution and the defence refer to the decision of the High Court in *Dato' Sri Mohd Najib bin Hj Abd Razak v Public Prosecutor* [2019] MLJU 190; [2019] 5 CLJ 93 (affirmed by the Court of Appeal and the Federal Court) where I stated the following general proposition of law:

> [15] It is quite manifest that the operational parts of the aforementioned statutory provisions state that any statements or documents obtained in the course of investigations, notwithstanding any written law or rule of law to the contrary, be admissible as evidence. This renders these clauses to be classified as non-obstante clauses.
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> [16] And literally read, as statutes at the first instance should always be, the objective appears to ensure that in respect of the admissibility of documents and statements obtained under the MACC Act or the AMLATFA, they shall be admissible as

evidence without more; and this also means there is absolutely no necessity to satisfy any conditions precedent in order to render any evidence admissible before a court proceeding.

...

[24] There is on the other hand a line of authorities which suggests that where the non-obstante clause refers generally without stating the specific provision or statute to be overridden, it is not permissible to exclude per se all other legislation or provisions in force in other statutes. In other words, absent very specific words of the exact rules or laws to be excluded, no such automatic displacement can be made effective.

[25] *The extent of such intended exclusion must be worked out from a further examination of the true objective and remit underlying the provisions where the non-obstante clause is adopted. As such, only if there arises a conflict between the specific statutory objective behind that provision and such other law on the same subject, would the other law be held to be excluded from being operative.*

...

[27] *The applicant has not clearly made out a case as to the extent to which the Legislature had intended to give the relevant non-obstante clauses overriding effect over all other rules and legal provisions*. In any event, in my view, the weight of authorities on the subject, particularly these two fairly recent Federal Court decisions in *Suruhanjaya Sekuriti v Datuk Ishak Ismail* — which subject the admissibility to the rules of evidence — and *Ho Tack Sien & Ors v Rotta Research Laboratorium SPA* — which requires specific identification of the rules to be excluded — provides a valid and compelling basis not to subscribe to the proposition advanced by the applicant that the non-obstante clauses in the instant case would have the effect of, without more, automatically rendering the statements and documents admissible obtained by MACC as evidence in any proceeding. (Emphasis added.)

[1133]In other words it is not the law that such non-obstante clause will always not be effective. Not at all. They will only be rendered ineffective if the court finds that the specific laws and rules which the provisions seek to exclude cannot be identified. The legislative intent must be first ascertained.

[1134]This is also the position taken by the Indian Supreme Court in *AG Varadarajulu and another vs State of Tamil Nadu and others* AIR 1998 SC 1388 a decision which was referred to in the Federal Court decision of *Ho Tack Sien & Ors v Rotta Research Laboratorium SpA & Anor (Registrar of Trade Marks, intervener)* [2015] 4 MLJ 166 where Zulkefli CJ (Malaya) (later PCA) stated the following in clear terms:

[39] Although s 40(1) of the Act begins with the words 'notwithstanding ...' it is a general principle that a non-obstante clause cannot go outside the limits of the Act itself. We are in agreement with the contention of the plaintiff that non-obstante clause is subject to the limitations contained in the section and cannot be read as excluding the whole Act and standing by itself. The principle was stated by the

Indian Supreme Court in *AG Varadarajulu & Anor v State of Tamil Nadu & Ors* AIR 1998 SC 1388 at para [16] as follows:

> It is well settled that while dealing with a non-obstante clause under which the legislature wants to give overriding effect to a section, *the Court must try to find out the extent to which the legislature had intended to give one provision overriding effect over another provision*. Such intention of the legislature in this behalf is to be gathered from the enacting part of the section. In *Aswini Kumar v Arbinda Bose* AIR 1952 SC 369, Patanjali Sastri J observed: The enacting part of a stature must, where it is clear, be taken to control the non-obstante clause where both cannot be read harmoniously. In *Madhav Rao Scindia v Union of India* [1971] 1 SCC 85 at p 139; AIR 1971 SC 530 Hidayatullah CJ observed that *the non-obstante clause is no doubt a very potent clause intended to exclude every consideration arising from other provisions of the same statute or other statute but for that reason alone we must determine the scope of that provision strictly*. When the section containing the said clause does not refer to any particular provisions which it intends to override but refers to the provisions of the statute generally, it is not permissible to hold that it excludes the whole Act and stands all alone by itself. *A search has, therefore, to be made with a view to determining which provisions answers the description and which does not*. (Emphasis added.)

[1135]Reference must now be made to s 71 of the AMLATFPUAA which reads as follows:

> Where the Public Prosecutor or any enforcement agency has obtained any document or other evidence in exercise of his powers under this Act or by virtue of this Act, such document or copy of the document or other evidence, as the case may be, shall be admissible in evidence in any proceedings under this Act, notwithstanding anything to the contrary in any written law.

[1136]First it should be made clear what enforcement agency means. This is provided in s 3(1) of the same Act which states:

> 'enforcement agency' includes a body or agency that is for the time being responsible in Malaysia for the enforcement of laws relating to the prevention, detection and investigation of any serious offence.

[1137]As such reference to the obtaining of documents by any enforcement agency pursuant to the powers under AMLATFPUAA or by virtue of the same Act means that any enforcement agency (by definition would in this case include the Royal Malaysia Police, the MACC and BNM) which has obtained any document or even a copy of document, may admit the same in evidence when the offence falls under the AMLATFPUAA, or the offence is 'by virtue of this Act' any of the 'serious offences' as defined in the Second Schedule to the AMLATFPUAA (which includes s 23 of the MACC Act and s 409 of the Penal Code), and produce those documents to prove the predicate and money

laundering offences under AMLATFPUAA, notwithstanding anything to the contrary in any written law.

[1138]And s 41A of the MACC Act also similarly provides that any document obtained by MACC shall be admissible in any proceedings under the MACC Act. Thus it reads:

> 41A Admissibility of documentary evidence
>
> Where any document or a copy of any document is obtained by the Commission under this Act, such document shall be admissible in evidence in any proceedings under this Act, notwithstanding anything to the contrary in any other written law.

[1139]The essence of s 71 of the AMLATFPUAA and s 41A of the MACC Act is quite definitive than that of s 30(9) of the MACC Act. The latter concerns statements given by potential witnesses to MACC which the provision containing the non-obstante clause renders admissible in court. Section 71 of the AMLATFPUAA and s 41A of the MACC Act on the other hand are specific in mentioning the remit of the provision which concerns admissibility of documents in s 71, the inclusion of other investigative agencies and other offences listed as serious offences and for both s 71 and s 41A even mention 'copy' of the document.

[1140]By way of interpretive process it was held in *Dato' Sri Mohd Najib bin Hj Abd Razak v Public Prosecutor* [2019] MLJU 190; [2019] 5 CLJ 93 that the statements cannot be automatically admissible considering the present law that treats such statements as privileged, to be protected against the risk of witness tempering and being given in official confidence. The argument of the defence in that application was that because s 30(9) says the statements are admissible, the defence had the right to be supplied with such statements. It was not therefore specifically about whether the statements were admissible but more whether they should be disclosed to the defence. In contradistinction in the instant case, the only issue is whether these documents in Classes 1, 2 and 3 are admissible.

[1141]The intention of s 71 of the AMLATFPUAA and s 41A of the MACC Act is plain and unambiguous. It is intended to exclude the application of certain provisions of the Evidence Act 1950 in relation to admissibility in that these requirements shall not be applicable to documents seized in the course of investigation, thus enabling these documents to be admitted as evidence.

[1142]This must mean that the provisions governing admissibility of oral and documentary evidence as contained in the Evidence Act 1950 are superseded, overridden and altogether dis-applied when either of s 71 of the AMLATFPUAA or s 41A of the MACC Act is relied on. These in my view

must include Chapter IV on Oral Evidence and Chapter V on Documentary Evidence of the Evidence Act 1950. Thus the latter include among others the law on proof of contents of documents (s 61), either by primary (ss 62 and 64) or secondary evidence (ss 63 and 65), as well as proof of signature (s 67).

[1143]If s 71 of the AMLATFPUAA and s 41A of the MACC Act are construed to be subject to these Evidence Act 1950 requirements, there is absolutely no reason for the Legislature to have enacted s 71 of the AMLATFPUAA and s 41A of the MACC Act in the first place. Without s 71 of the AMLATFPUAA and s 41A of the MACC Act, reliance will in any event have to be made on the Evidence Act 1950 to admit documents obtained from investigations under those statutes as evidence anyway.

[1144]Again, the position of s 30(9) of the MACC Act in *Dato' Sri Mohd Najib bin Hj Abd Razak v Public Prosecutor* [2019] MLJU 190; [2019] 5 CLJ 93 may be readily contrasted. For s 30(9) is primarily about the power of MACC officer to examine persons for purposes of investigation. In respect of the power to compel persons to appear before the MACC to have his statements recorded, the law in s 30(9) states that such statements shall be admissible in evidence in any proceedings for an offence under that Act, notwithstanding any written law or rule of law to the contrary.

[1145]It is therefore about the effects of the statements. The provision in s 30(9) does not cease to be operational or effective if the statements from potential witnesses must comply with the documentary evidence provisions for the admissibility of documents. Section 30(9) itself refers to not only such statements, but also any book, document, record, account or computerised data.

[1146]The case of *Dato' Sri Mohd Najib bin Hj Abd Razak v Public Prosecutor* [2019] MLJU 190; [2019] 5 CLJ 93 is however, vis a vis s 30(9) of the MACC Act, concerned only with statements recorded by MACC from potential witnesses where the non-obstante clause had relevance to the existing law of such statements being privileged, given in official confidence, and to be safeguarded from the risk of witness tampering. In contradistinction, s 71 of the AMLATFPUAA and s 41A of the MACC Act are specific in stating that all documents obtained shall be admissible. And it has nothing to do with statements recorded from potential witnesses.

[1147]As such, I accept the submission of the prosecution that whatever irregularities in the compliance with the provisions of the Evidence Act 1950 as highlighted by the defence, which in the absence of s 71 of the AMLATFPUAA and s 41A of the MACC Act would bar the admission of those documents categorised as Class 1, Class 2 and Class 3 as evidence, will however now no

longer prevent this court from receiving the said documents as evidence. A

[1148]Furthermore, I should add that on a plain and ordinary reading of s 71 of the AMLATFPUAA and s 41A of the MACC Act, the non-obstante clause would render all such documents admissible. And even considering that s 17A of the Interpretation Acts 1948 and 1967 enjoins a court to interpret a provision of an Act of Parliament that would promote the purpose or object underlying the Act, it is plain for example, that AMLATFPUAA is the primary legislation in this country enacted to combat money laundering — a criminal activity that is the now a constant scourge of the modern world, presenting a clear and present danger to any country which allows such activities left unchecked. B C

[1149]The provisions regulating the admissibility of documents under s 71 of the AMLATFPUAA and s 41 of the MACC Act must be construed in the context of those specific legislation and not under the generally applicable Evidence Act 1950. To that extent the general provisions of the Evidence Act 1950 must *ex necessitate* yield to the specific provisions of s 71 of the AMLATFPUAA and s 41A of the MACC Act. D E

[1150]It would be essential for the court to examine the reason for s 71 of the AMLA and s 41A of the MACC Act and take a purposive approach in interpreting these sections. AMLATFPUAA, as mentioned, is the principal and specific legislation dealing with money laundering. The MACC Act is enacted to establish the Malaysian Anti-Corruption Commission (MACC) and to make further and better provisions for the prevention of corruption. F

[1151]Thus s 17A of the Interpretation Act 1948 and 1967 mandates this court to hold that ss 60–67 of the Evidence Act 1950 are superseded by the provisions of s 71 of the AMLATFPUAA and s 41A of the MACC Act which promote the admissibility of documents. I must emphasise that the reception of these documents in evidence does not constitute proof of the truth of the contents of these documents. The truth of the contents, in terms of its credibility and veracity is an entirely different matter that must be established by the prosecution. The court will then determine the weight if any to be given to these documents. G H

[1152]Furthermore, s 71 of the AMLATFPUAA and s 41A of the MACC Act are special provisions that exclude the operation of a general provision of the law under the Evidence Act 1950. This brings to the fore the cardinal principle of interpretation of *generalibus specialia derogant* which basically means that where a special provision is made in a special statute, that special provision excludes the operation of a general provision in the general law. The I

AMLATFPUAA and the MACC Act are special statutes. The Evidence Act 1950 is an example of a general law.

[1153]I need only on this point refer to one case of high authority. Raja Azlan Shah CJ (Malaya) (as HRH then was) in the Federal Court decision in *Public Prosecutor v Chew Siew Luan* [1982] 2 MLJ 119 explained in the following clear fashion the application of this principle:

> The Dangerous Drugs Act 1952 (Revised 1980) is an Act specifically designed to regulate the importation, exportation, manufacture, sale and use of, inter alia, dangerous drugs, and 'to make special provisions relating to the jurisdiction of courts in respect of offences thereunder and their trial, and for purposes connected therewith'. In other words, the Act is in substance a special law passed by Parliament in derogation of the rights of a person concerning the granting of bail in an otherwise ordinary case. We further note in particular that s 41B of the Act is an entirely new section introduced by the Dangerous Drugs (Amendment) Act 1978 (Act A426) and became operative on 10 March 1978. *Generalibus specialia derogant* is a cardinal principle of interpretation. It means that where a special provision is made in a special statute, that special provision excludes the operation of a general provision in the general law (see also *Public Prosecutor v Chu Beow Hin* [1982] 1 MLJ 135). The provisions of s 3 of the Criminal Procedure Code which counsel for the respondent seeks to rely on has no relevance whatsoever to the matter in issue before us.
>
> It would be erroneous to apply expressions used and provisions made in one statute to another and entirely different one in complete disregard of the latter's express stipulations in the light of its specific purpose and object.

[1154]It is also a well-entrenched principle of law that Parliament does not legislate in vain (see the decisions of the Federal Court in *Positive Vision Labuan Ltd v Ketua Pengarah Hasil Dalam Negeri and other appeals* [2017] 2 MLJ 421; [2017] 9 CLJ 595 and *Tony Pua Kiam Wee v Government of Malaysia and another appeal* [2019] 12 MLJ 1; [2020] 1 CLJ 337). The construction ascribed by the defence to s 71 of the AMLATFPUAA and s 41A of the MACC Act would render these provisions completely otiose. This would be repugnant to the principle that Parliament shuns tautology in enacting statutes.

[1155]There are, as stated earlier, however other arguments posited by the defence that challenge the application of s 71 of the AMLATFPUAA and s 41A of the MACC Act. They are however unmeritorious. I shall deal with them only in summary fashion.

[1156]First, on AMLATFPUAA, the defence contends that evidence collected under the MACC Act (for the abuse of position offence under s 23) and the Penal Code (for the CBT charges under s 409) cannot be admitted under AMLATFPUAA.

[1157]This contention is without substance as it ignores s 68 of the AMLATFPUAA which states as follows: A

> 68 Additional powers of competent authority and enforcement agency
>
> (1) For the avoidance of doubt, the functions conferred on the competent authority or an enforcement agency under this Act shall be in addition to its functions under any other written law. B
>
> (2) Where an enforcement agency enforcing the law under which a related serious offence is committed gathers evidence with respect to any investigation relating to that offence, such evidence shall be deemed to be evidence gathered in accordance with this Act. C

[1158]The language in s 68(2) is unmistakably clear. Evidence gathered under any serious offence, as widely defined in AMLATFPUAA — in this case, s 23(1) of the MACC Act and s 409 of the Penal Code — are deemed as evidence gathered under AMLATFPUAA. The investigating officer (PW57) confirmed that his investigation was pursued under the three legislation. The AMLATFPUAA, the MACC Act and the Penal Code. D

[1159]PW57, during examination-in-chief clearly explained, as per the notes of proceedings dated 9 August 2019 — PW57, as follows: E

> S: Ada kad kuasa? Okay terima kasih. Ya, Encik Rosli ya, apabila awak dilantik sebagai IO kes ini pada 6/5/2015 ya bagi menyiasat kes ini, siasatan yang awak lakukan bagi SRC International ini di bawah Akta mana? F
>
> J: Siasatan yang saya buat di bawah repot ini, Yang Arif, meliputi Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009, Anti Money Laundering Act, AMLA, AMLATFAPUAA, Kanun Keseksaan, dan kesalahan-kesalahan di bawah Kanun Keseksaan. G

[1160]During cross-examination, PW57 stated that he had invoked the powers under the MACC Act, specifically, ss 30 and 35 to compel the surrender of documents which now form the exhibits in this case. For this reason, the defence contends that AMLATFPUAA cannot apply to PW57's investigation because PW57 exercised his powers as an investigating officer under the MACC Act with no reference to any provision of AMLATFPUAA. H

[1161]This is plainly misconceived. s 68(2) of the AMLATFPUAA, I reiterate, deems all evidence gathered by an enforcement agency relating to a serious offence (which includes the MACC Act and the Penal Code offences which are the premise of the charges in this trial) as evidence gathered in pursuance of AMLATFPUAA. The enforcement agency in this investigation — the MACC as represented by PW57, and all evidence gathered under the *non obstante* I

clauses which include in s 71 of the AMLATFPUAA and s 41A of the MACC are therefore admissible in evidence.

[1162]As for s 41A of the MACC Act, the defence contends that this provision has no application in this case as it was incorporated into the MACC Act in pursuance of s 11 of the MACC Amendment Act 2018 which came into effect on 1 October 2018, and that it has no retrospective effect for the offences committed between August 2011 and February 2015 subject to the seven charges.

[1163]This contention of the defence is untenable for two reasons. The first is that the issue of retrospectivity does not come into the picture at all. This s 41A of the MACC Act essentially states that any document obtained by the MACC shall be admissible in any proceedings under the MACC.

[1164]The fact that this s 41A of the MACC became effective from 1 October 2018 does not mean that documents which were created prior to that date (such as from 2011–2015, relevant to the charges in this case) do not come within the scope of s 41A. Those documents would still be admissible provided that the proceedings in which they are proposed to be admitted as evidence take place after the amendment (the insertion of the new s 41A) came into effect. This ground alone puts paid to the argument of the defence.

[1165]The second reason is that, in any event, s 41A of the MACC Act applies retrospectively, in that it applies even prior to the date of its commencement on 1 October 2018 because s 41A of the MACC Act is procedural in nature. It does not affect any substantive right. The law is that statutes dealing with procedure have retrospective effect unless clearly stated to the contrary. There is no dearth of authorities on this point.

[1166]Suffian LP, for the Federal Court in the case of *Lee Chow Meng v Public Prosecutor* [1978] 2 MLJ 36 in dealing with the interpretation of the effects of the amendments to ss 50(1) and 66 of the Court of Judicature Act 1964 which removed the right of the appellant to make a reference from the High Court in respect of a decision of the sessions court to the Federal Court, but which the amendments conferred the right of appeal to the Federal Court from the decision of the High Court, instructively ruled in the following terms:

> *A statute dealing with procedure has retrospective effect, that is, it applies to proceedings begun before and after the commencement of the statute, unless a contrary intention is expressed or clearly implied.*This was so stated by Lord Blackburn in *Gardner v Lucas* (1878) 3 App Cas 582 at p 603.
>
> > ... it is perfectly settled that if the legislature forms a new procedure, that, instead of proceeding in this form, you should proceed in another and a different way,

clearly there bygone transactions are to be sued for and enforced according to the new form of procedure. *Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be*. (Emphasis added.)

[1167]Notwithstanding art 7 of the Federal Constitution which provides the constitutional safeguard against retrospective legislation in criminal laws, the Federal Court in *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 affirmed that parties are to be governed by the law in force on the date the action is instituted but that Parliament can legislate retrospectively, where Raja Azlan Shah (as HRH then was) observed:

... Retrospective legislation is one of the incidents of plenary legislative powers and as such is not required to be spelt out in the Constitution. Subject to the constitutional limitation of Article 7 of the Constitution, to wit, protection against retrospective criminal laws and repeated trials, Parliament would be within the ambit of its competence if it deems fit to legislate retrospectively. ...

[1168]In any discussion of laws with retrospective effect, the question must be whether the law in question is characterised as procedural or substantive, for such effect is countenanced only in the case of the former. In the landmark case in the jurisprudence of the country's administrative law, that of *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, the Federal Court, when discussing the position of s 17(1) of the Courts of Judicature Act 1964, it was held as follows:

The most decisive limitation placed on the powers of the Rules Committee, and indeed on other rule-making authorities, is that they extend to regulating the 'practice and procedure' of the High Court and other courts for which the Rules are made. Although these powers are wide, yet it cannot be gainsaid, that they do not extend into the area of substantive law. Clearly, there is a vital distinction made between, on the one hand, substantive law, the function of which is to define, create, confer or impose legal rights and duties, and on the other hand, procedural law, the function of which is to provide the machinery, the manner or means, by recourse to which legal rights and duties may be enforced or recognised by courts of law or any other tribunal seized with jurisdiction to adjudicate on a dispute before it.

[1169]Is s 41A a procedural or substantive law? It does not define, create, confer or impose legal rights and duties to any party or person. It concerns the admissibility of documents or copy of documents obtained by MACC in any trial proceedings held after 1 October 2018, as in the instant case.

[1170]Thus, if the law has nothing to do with the creation of any offence or with punishment for any offence, but instead deals with the mode of trial, it is purely procedural and does no violence to art 7 of the Federal Constitution (see the Federal Court decision in *Lim Sing Hiaw v Public Prosecutor* [1965] 1 MLJ 85).

[1171]More directly to the point it has also been held that statutes dealing with the admissibility of evidence are procedural in nature. No less a judicial figure than Lord Denning himself, in a House of Lords decision in *Blyth v Blyth* [1966] 1 All ER 524 said:

> ... I think that the commissioner was wrong in holding that the evidence was not admissible. The rule that an Act of Parliament is not to be given retrospective effect only applies to statutes which affect vested rights. It does not apply to statutes which only alter the form of procedure, or the admissibility of evidence, or the effect which the courts give to evidence.

[1172]Notwithstanding the decision in the case of *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1 which seems to support the case of the defence, there is no shortage of local authorities which have held to the contrary either. The Federal Court in *Public Prosecutor v Datuk Haji Harun bin Haji Idris* [1977] 1 MLJ 14 in dealing with the effect of the amendment to s 113 of the CPC which rendered statements recorded under s 112 of the CPC admissible said, in the judgment of Raja Azlan Shah FJ (as HRH then was) as follows:

> The general rule is that statutes, particularly amending statutes, are prima facie prospective, and retrospective effect is not to be given to them unless by clear words or necessary implication. This presumption does not always apply in cases of legislation dealing with procedure or evidence. Before the amendment a statement recorded under s 112 of the Criminal Procedure Code cannot, by virtue of s 113 of the Criminal Procedure Code be used as evidence against the accused. After the amendment such a statement shall be admissible in evidence at his trial. This only means that the rule governing the manner in which such statement can be used as evidence at his trial has been amended. The change is one in procedure; the amendment to s 113 of the Criminal Procedure Code affected the manner in which such evidence is to be enforced. An amending statute which is purely procedurial is to be construed as retrospective in its operation, unless a contrary intention appears ...

[1173]In similar vein, the Court of Appeal in *Msimanga Lesaly v Public Prosecutor* [2005] 4 MLJ 314 in the judgment of Gopal Sri Ram JCA (as he then was) held more specifically thus:

> [11] The judicial basis for the foregoing conclusion is not difficult to find. Rules governing the admissibility of evidence are procedural and not substantive: see *Public Prosecutor v Datuk Haji Harun Idris* [1977] 1 MLJ 14. Hence, a rule against admissibility of evidence is a procedural safeguard to ensure that an accused receives a fair trial and is therefore available for use in the accused's favour, whether he avails of it or not.

[1174]As such the objections raised by the defence to the admissibility of the relevant documents as listed must fail.

Other applications and rulings in the course of the trial

[1175]For completeness, I should also record in this judgment the other applications made in the course of this trial so as to provide as far as possible a full picture of the matters raised by parties in this proceeding. These however are not as critical to have justified being included in the analysis of the evidence, as I have done for a number of others earlier as part of the evaluation of the relevant issues. The following applications all arose during the prosecution stage.

Whether defence could refer to unsigned witness statement under s 402B of the CPC

[1176]Upon the completion of the examination-in-chief of PW54 the defence started to make reference to the draft witness statement by PW54 which had been served on the defence earlier by the prosecution but which version was superseded by the final version that was read out and signed in court by PW54. The prosecution however objected to the defence making reference to the draft version.

[1177]This objection by the prosecution against the defence relying on the draft and unsigned witness statement of PW56 is based on s 402B of the Criminal Procedure Code. This provision deals with proof of witness statements and admissibility of evidence stated therein.

[1178]Section 402B of the CPC reads as follows:

> 402B Proof by written statement
>
> (1) In any criminal proceedings, a written statement by any person shall, subject to the conditions contained in subsection (2), be admissible as evidence to the like extent as oral evidence to the like effect by that person.
>
> (2) A statement may be tendered in evidence under subsection (1) if —
>
> (a) *the statement purports to be signed by the person who made it;*
>
> (b) *the statement contains a declaration by that person to the effect that it is true to the best of his knowledge and belief*; and
>
> (c) a copy of the statement is served, by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings not later than fourteen days before the commencement of the trial unless the parties otherwise agree.
>
> (3) Notwithstanding paragraph (2)(c), a party proposing to tender a statement in evidence under subsection (1) may not serve the statement to

any other parties to the proceedings where the parties to the proceedings agree before or during the proceedings that the statement shall be so tendered.

(4) If a statement proposed to be tendered in evidence under subsection (1) —

(a) is made by a person who cannot read, the statement shall be read and explained to him before he signs it and the statement shall be accompanied by a statutory declaration made under the Statutory Declarations Act 1960 by the person who so read the statement to the effect that it was so read and explained; or

(b) refers to any other document or object as an exhibit, the copy served on any other party to the proceedings under paragraph (2)(c) shall be accompanied by a copy of that document or by a photograph of the object and such information as may be necessary in order to enable the party on whom it is served to inspect the document or object, as the case may be, unless it is not expedient to do so.

(5) Notwithstanding that the written statement of a person may be admissible as evidence by virtue of this section —

(a) the party by whom or on whose behalf a copy of the statement was served may call the person making the statement to give additional evidence which may include matters which are not contained in the statement; and

(b) the maker of the statement shall attend the trial for cross-examination and re-examination, if so requested.

(6) So much of any statement as is admitted in evidence by virtue of this section shall, unless the Court otherwise directs, be read aloud at the trial and where the Court so directs an account shall be given orally of so much of any statement as is not read aloud.

(7) Any document or object referred to as an exhibit and identified in a written statement admitted in evidence under this section shall be treated as if it was produced as an exhibit and identified in the Court by the maker of the statement.

(8) A document required by this section to be served on any person may be served —

(a) by delivering the document to the person himself or to his advocate; or

(b) in the case of a corporation, by delivering the document to the secretary or other like officer of the corporation at its registered or principal office or by sending the document by registered post addressed to the secretary or other like officer of the corporation at that office. (Emphasis added.)

[1179]Section 402B clearly states that such a statement is admissible subject to the conditions set out in sub-s (2)(a) which include the statement is signed by the witness. This has been reaffirmed by a decision of the Court of Appeal *Mahdi Keramatviyarsagh Khodavirdi v Public Prosecutor* [2015] MLJU 14; [2015] 3 CLJ 336 referred to by the prosecution, where Tengku Maimun Tuan Mat JCA (now Chief Justice) held as follows:

> [12] Section 402B deals with proof of written statement and it relates to the issue of admissibility of the evidence stated therein. From the clear wordings of the section, we agreed with learned counsel that the preconditions in sub-s (2) must be complied with before the witness statement of SP1 can be admitted as evidence.
>
> [13] We have perused the notes of proceedings and we found no indication that SP1 had read out the witness statement. We further found that the witness statement of SP1 did not bear his signature and neither did the witness statement contain a declaration as required under para (2)(b) of s 402B of the CPC. Hence, the preconditions set out in para (2) for the admissibility of the evidence had not been complied with, rendering the witness statement of SP1 inadmissible. Consequently, there was no evidence on the nature or contents and the weight of the capsules. The subject matter of the charge, namely the dangerous drugs, methamphetamine had not been proven.

[1180]The prosecution therefore applied to this court to disallow such reliance by the defence.

[1181]I observed however that the defence is however not relying on the unsigned version as a witness statement under s 402B, but instead as proof of another statement previously made by the witness. The defence seeks to refer to the unsigned or draft witness statement made by PW54 and given to the defence earlier to attempt to show differences when compared against the witness statement which was read out and signed by the PW54.

[1182]As such, in my view since the defence did not intend to rely on the unsigned version to be admitted under s 402B as a witness statement, but merely wanted to use or make reference to the unsigned version, just like the defence being able to refer to other documents attributed to PW54 to cross-examine her (without these documents necessarily being admitted in evidence), s 402B would not be applicable. As such there was no issue of non-adherence to s 402B of the CPC. I therefore overruled the objection by the prosecution.

Whether the MACC could direct Am-Islamic Bank not to release to the accused documents and information concerning the account of the accused

[1183]This court had also been asked to provide a ruling on another matter. This concerned a complaint raised by the defence, not once but a few times

A with the MACC, in response to MACC's objection to AmBank releasing documents or information concerning the personal accounts of the accused to the accused himself.

B **[1184]**The defence claimed that the documents were necessary for the accused to fully prepare himself for the trial. It appears that the bank, based on the letters it sent to the accused, had no issue with the release but the clearance of the investigating officer must, according to the bank be secured as a pre-condition.

C **[1185]**The prosecution resisted this request, and the key reason proffered for this was essentially that such disclosure could interfere with the investigation process.

D **[1186]**I heard short oral submissions on the matter. I allowed the request.

[1187]For the purposes of his defence, the accused had been requesting for his account information to be released to him by AmBank Group. The bank, based on a letter shown to court was agreeable to do so but was prevented from E acceding to the request following an instruction by the MACC, expressed through the investigating officer in this case.

[1188]I noted however that the prosecution has not shown any specific F statutory provisions that authorise the MACC to issue the instruction to AmBank not to release information or documents requested by the accused concerning his own account.

[1189]That I found to be totally unsurprising because no such provisions exist G in the MACC Act or any other legislation such as the Financial Services Act 2013 or the Islamic Financial Services Act 2013. The latter two statutes which embody the bulwark of the banking legislation in this country in fact contain clear prohibition against the bank disclosing customer information to other parties in order to fully respect customer confidentiality. There is nothing that H even suggests that access to such information should be denied to the customer himself.

[1190]In addition, I find the argument that such instruction from MACC to I be part of the investigation process that the courts should be slow to interfere with to be of little merit. The MACC is not prevented from pursuing its investigation and is entitled to seize documents and information as may be authorised under the MACC Act.

[1191]This is because the investigation would in no way be adversely affected by AmBank releasing information or documents which the accused is in any event entitled to as the account holder. Furthermore, banks would ordinarily only provide copies of relevant information to its account holders, such that in this case, again, there is nothing preventing the MACC to seize the original documents of the same information now requested by the accused, should that be the case.

[1192]As such in view of the above, and in order to ensure both the integrity of the trial process and a fair trial, which includes the right of the accused to prepare a proper defence, the MACC should not, in this case, prevent the Am-Islamic Bank from providing to the accused copies of documents concerning his account which the bank has already agreed to release to him. The application by the defence is therefore allowed.

Whether video of proceedings, selfie in court and comments on trial evidence on Facebook constitute sub judice

[1193]In the course of the prosecution case there were three occasions where complaints were raised by the prosecution about certain conduct which appeared to interfere with the trial proceedings and thus to be potentially contemptuous.

[1194]The first was that certain parts of the proceedings which had taken place in the afternoon of 18 April 2019 (day 5) were uploaded on a Facebook page of a certain individual and consequently made widely available on the social media. It is clear from the footage which had been edited and ran for several minutes that the recording was from the court recording transcription or the CRT system. This was done after the proceedings ended on the Friday, which led the attorney general to raise the matter at the start of the proceeding the following Monday 22 April 2019.

[1195]The attorney general submitted that there must have been a breach in respect of the use of CRT attributed to the accused given that the person who uploaded the CRT footage on his Facebook was a former aide of the accused.

[1196]The defence however argued that the prosecution was jumping the gun and that even the defence team was then still trying to find out how the individual concerned could have got into the possession of the CRT copy, assuming it had come from the defence team.

[1197]I emphasised in open court that any form of recording of court proceedings, apart from the court-administered CRT system, is not permitted. This prohibition extends to not only the live screening or telecast of the

proceedings, but also the act of up loading and sharing any part of any recording of the proceedings on social media and this includes the recording by the court recording and transcription system.

[1198]The CRT is a system designed to assist the court, the prosecution and the defence in reviewing the proceedings and for the notes of proceedings to be transcribed.

[1199]Under present procedure, copies of the CRT recordings are therefore usually given to the prosecution and the defence for the notes of proceedings to be transcribed to assist them prepare their examination of witnesses and make submissions on issues arising. This is in addition to the notes that are also taken by members of the respective teams. As such, under the court procedures, these CRT recordings are supplied to prosecutors and lawyers on the express written undertaking that the CRT would be used only for such purpose and not for any circulation, copying or uploading onto any system. The CRT cannot and is not meant to be used for any other purpose.

[1200]There could potentially be two separate wrongdoings here. First was the breach of the undertaking on use of CRT, and secondly, the consequential unauthorised sharing of the CRT footage on the media social.

[1201]The case presently before this court is no exception. The CRT recordings were given to both prosecution and defence in consideration of their written undertakings on the permitted use of the CRT. It was clear from what had happened that there had been a breach of the undertaking given to the court either by the prosecution or the defence who had made available the CRT to a third party who in turn caused the same be made widely and publicly available on social media.

[1202]This court took a serious view of the breach that led to the uploading of the CRT footage more so since members of the prosecution and the defence teams are all officers of the court. This court then decided to remind both teams to abide by and honour their undertakings to the court. Any transgression in the future would attract appropriate action in response. This could include the court no longer providing the CRT to parties who would in such event have to rely on their own notes of evidence. After all the duty of the Court Registry under the Criminal Procedure Code is to provide the notes of the proceedings only when there is an appeal after the conclusion of the trial.

[1203]At the same time I reiterated that the act of up loading and making available CRT recordings in the public domain by any person without the approval of the court is not permitted.

[1204]Quite apart from absence of approval, more importantly such up loading of the footage by any person, when accompanied with an opinion or commentary which purports to analyse evidence produced in the course of an ongoing trial, and especially when the footage is even edited to suit the commentary (like what was alleged here by the prosecution) risks being held to be in contempt of court.

[1205]This is because it tends to prejudge the issues which have yet to be determined by the court and potentially affects the integrity of the process of witnesses giving testimony in court. In other words such state of affairs is contemptuous because it undermines the administration of the criminal justice system in this country. This court therefore reminded all parties to refrain from engaging in any conduct that could constitute a violation of the law of contempt or defamation.

[1206]On the request by the attorney general for the defence to cite the accused for contempt for the breach which the AG suggested was attributed to the defence and the accused, given that the individual who had made the Facebook posting was a former officer of the accused, I stated my position that a formal application be made, so that full arguments may be heard on the same before any decision is taken. At the same time, I had taken note that a police report had already been lodged, and this will no doubt be for the authorities to pursue as they consider appropriate. No less importantly, I emphasised that the matter should not detract this court from focusing on the trial of this case.

[1207]The second incident was the complaint, first highlighted by a number of media representatives seated in the public gallery that the accused had taken a selfie (or more) during the morning session of the proceedings on 9 May 2019 (day 16). As the court resumed after lunch break on the same day, the matter was raised by the prosecution. Learned lead prosecutor urged the court to issue a guidance on the matter for everyone to abide by. It was not in dispute that the alleged incident was not witnessed by any member of either defence or prosecution team. I too did not see the same. Learned senior counsel took offence with the reports of the accused taking selfie, claiming that some media representatives in the court had resorted to misreporting for sensationalism.

[1208]I directly asked the accused whether he did as alleged. The accused replied by stating that he had switched on the selfie mode on his mobile phone to view his face as he felt something had got into one of his eyes. He denied taking selfies in court. I gave him the benefit of doubt and said the reporters could have misconstrued the accused's action vis a vis his mobile phone.

[1209]Notwithstanding, I decided to issue a general reminder that court rules prohibit any form of recording and photography in the court room, and that

this prohibition is already known to most people. If the reports about the accused taking selfies in court were true, which I accepted had been denied by the accused, then that would be an infringement of the rules which is made much more serious and potentially bordering on being in contempt of court because it is reported that the act was done during court proceedings.

[1210]This court would not hesitate to take appropriate action should such a violation occur in future. Other than possible initiation of contempt proceedings, the court would also direct court police to get those in default to surrender their mobile devices to the court police, to be returned at the end of the proceedings.

[1211]Again I emphasised that the sanctity and integrity of proceedings in a court of law must always be respected. Courts operate to dispense justice, and the justice system can only do so effectively and fairly if the administration of justice is not interfered with.

[1212]The third incident also originated from the accused. This was when the accused made a posting on his Facebook commenting specifically on or more like attempting to provide his version vis a vis the testimony of a witness given in court earlier in the day, namely PW47 from AmBank who testified on the credit card spending by the accused in Italy. The matter was raised in court by the attorney general, who requested that the accused be asked to apologise to the court for the posting. It was asserted by the learned attorney general that the conduct was a contempt of court 'although not sub-judice'.

[1213]Not wanting the proceedings to be unnecessarily side tracked or that the due process under the law not followed, I asked that a formal application be filed. At the same time, I considered that the prosecution could also clearly state what exactly was the prayer it wished the court to impose (since the attorney general insisted that the objective was to get an apology) and before that the basis for the request (since the attorney general said this was not sub judice).

[1214]The prosecution did subsequently file a notice of motion but the exact basis of the application and what it intended to achieve were still pretty vague. It is rudimentary that the law cannot compel an accused to apologise for a matter that has not been established to be wrongful. On 9 August 2019, the day fixed for the hearing, which was opposed by the defence, the learned attorney general informed the court that the prosecution decided not to pursue the matter and wished for the application be withdrawn. No reasons were given.

[1215]I had taken note of the decision of the learned attorney general not to pursue the application to require the accused apologise to this court for certain Facebook postings made by the accused. The application was therefore struck

out and as a consequence the application by the accused to strike out the application by the prosecution was also struck out.

[1216]Notwithstanding the withdrawal, I did not think that the matter should just be ignored. The accused did make postings on his Facebook on evidence led in court. In my view it would be proper for this court to make certain observations, which I did, as follows.

[1217]It is basic that the court will only evaluate evidence which is adduced during trial. It does not take into account extraneous matters such as arguments posted on the social media. Such postings are irrelevant to this trial because due administration of justice requires a decision which is based on properly adduced evidence in a court of law. Due administration of justice also demands that once a dispute has been submitted before a court of law there must not be any usurpation of the function of the court to decide on the dispute. One therefore cannot publicly prejudge the issues which the court is required to adjudicate on.

[1218]As such, public comments such as Facebook postings on evidence already presented in court, when the trial is still ongoing, more so made by an accused in that trial who has all the rights to examine witnesses and defend himself to explain or rebut the evidence of the prosecution, is particularly objectionable.

[1219]Such postings may pre-judge the issue and prejudice a fair trial, interfere with the formal trial process and undermine the integrity of the due administration of the criminal justice system, and may therefore tantamount to a contempt of court.

[1220]This court again reminds everyone and the accused in particular to avoid any conduct that may interfere with the administration of justice and risks being in contempt of court. It would be wise for legal advice be first sought before anyone wishes to take any action or make any comments on this case and ongoing trial.

[1221]For completeness I should probably add that a common theme that runs through these three incidents is the issue of contempt of court — specifically sub judice. There appears to still be some confusion as to whether sub judice is applicable in Malaysia. Sub judice is an aspect of contempt and is plainly part of the law in this country. This is settled by the Federal Court exactly a week after the trial in this case started.

[1222]In *Dato' Sri Mohd Najib bin Hj Abd Razak v Public Prosecutor* [2019] 8 MLJ 624; [2019] 4 CLJ 799 I held that whilst sub judice applied in Malaysia,

A the accused failed to meet the test to warrant the issue of a gag order by this court to prevent any discussion on the merits of the case. I must also state that a gag order is a form of a prior restraint. Whilst its objective may include to prevent sub judice, this is unlike a situation where contempt proceedings be initiated for an act of sub judice which has taken place. As such the
B considerations for the granting of a gag order are not the same as those to establish whether the matter is sub judice in the first place, like what had been alleged in the three incidents I highlighted above.

C **[1223]**On the applicability of sub judice, in *Dato' Sri Mohd Najib bin Hj Abd Razak v Public Prosecutor* [2019] 8 MLJ 624; [2019] 4 CLJ 799 I stated thus:

> [69] I should add for emphasis that jury trials have also been abolished for criminal cases in this country. I would not go so far as saying that sub judice has no application in Malaysia. I think that is quite misconceived. However, the absence of
D jury trials does principally mean that the scope for the application of the sub judice rule is decidedly more circumscribed in the Malaysian justice system.
>
> [70] As for the concern on the unwarranted publicity influencing the witnesses, as mentioned by the Federal Court in *Loot Ting Yee*, the witnesses to be called to testify will in any event turn out to be either reliable and credible or otherwise, pursuant to
E the time-honoured process of examination-in-chief, cross-examination and re-examination by prosecution and the defence. Decisions of the judge will also no doubt be subject to the appeal process.
>
> [71] However, notwithstanding the absence of jury trials, which I agree would substantially remove the concerns about the possibility of decision makers being
F influenced by extrinsic matters, publications and statements which can still be shown to carry a real and substantial risk of seriously prejudicing and pre-judging the issues at stake before the courts may still be in criminal contempt of undermining the course of justice.
>
> [72] As I have mentioned, one of the key objectives of the sub judice rule is to
G prevent the usurpation of the role of the courts in adjudicating disputes including in criminal trials. Therefore, even in the absence of jury trials, the proper administration of the criminal justice system could still be adversely interfered with if, to take an extreme example, the media, mainstream and alternative were free to discuss and evaluate the evidence adduced in court in an on-going trial and
H comment on the credibility of the testimony of witnesses, and suggest what ought to be done by prosecutors, counsel and the judge, even where they went wrong, all in a special segment of the prime time evening news on television on daily basis throughout the proceedings. This state of affairs is manifestly not one to be countenanced by any justice system.
>
> I [73] Nevertheless, I reiterate that in determining whether there is an immediate threat of a real and substantial risk of serious prejudice to the due administration of a fair trial for the applicant and the criminal justice system in the country, the fact of the absence of jury trials would in my view make the case for a gag order against publication and discussion of the criminal charges against the applicant considerably much more difficult to establish.

[1224]The Court of Appeal, in *Dato' Sri Mohd Najib bin Hj Abdul Razak v Public Prosecutor* [2019] 4 MLJ 74; [2019] 4 CLJ 723 in a judgment delivered by Zabariah Mohd Yusof JCA (as she then was) agreed that sub judice still applies in this country. Her Ladyship said thus:

> [37] The learned trial judge also recognised that notwithstanding the absence of the jury trials which would remove the concerns about the possibility of decision-makers being influenced by extrinsic matters, publications and statements which can still be shown to carry a real and substantial risk of serious prejudicing and prejudging the issues at stake before the courts, may still be in criminal contempt of undermining the course of justice (para 71 of the grounds). This is especially true when one of the key considerations of the sub judice rule is to prevent the usurpation of the role of the courts in adjudicating disputes including criminal trials. Hence, even in the absence of jury trials, the due administration of justice could still be adversely affected if the media were unfettered to discuss matters and evaluate the evidence adduced in court in an ongoing trial and comment on the credibility of the testimony of witnesses, and suggests what ought to be done by the prosecutors, counsel and the judge, even condemning them, are state of things which should not be tolerated in any judicial jurisdiction (see *Attorney General v Times Newspaper* [1973] 3 All ER 54).
>
> [38] The Federal Court in *Loot Ting Yee v Tan Sri Sheikh Hussein Sheikh Mohamed & Ors* [1982] 1 MLJ 142; [1982] CLJ 664; [1982] CLJ (Rep) 203 has the occasion to consider the category of contempt which is based on conduct which prejudges any issue pending before the court. The Federal Court held that by 'prejudgment is meant, of course, a publication which takes up a stand as to which party in a given case is right or wrong either *in toto* or on a particular issue of the case. (Refer to *Attorney General v Times Newspaper*).
>
> [39] The learned trial judge also considered the concern on the unwarranted publicity influencing the witnesses as stated in *Loot Ting Yee v Tan Sri Sheikh Hussein bin Sheikh Mohamed & Ors*. However, that is being taken care of, as, ultimately, the prospective or potential witnesses will not be improperly influenced in any way. The witnesses would be subjected to examination, cross-examination and re-examination and the judge will be the ultimate decision-maker as to the witnesses' credibility and reliability. Subsequently, the decision of the judge will be subjected to an appeal process until the apex court, which consists of different other individual judges.
>
> [40] We do not find any flaw in the reasoning of the learned judge in this respect and we are in agreement with the learned trial judge that the sub judice rule applies in this country despite the absence of jury trials nowadays.

[1225]A seven judge bench of the Federal Court in *Dato' Sri Mohd Najib bin Hj Abd Razak v Public Prosecutor* [2019] MLJU 283; [2019] 4 CLJ 705 led by Richard Malanjum CJ dismissed the appeal by the accused and affirmed the decisions of the Court of Appeal and the High Court.

Decision at the end of prosecution case

[1226]In conclusion, in light of the foregoing evaluation and analysis, upon a maximum evaluation of all the evidence adduced before me at the end of the prosecution stage, involving an assessment of the credibility of the prosecution witnesses and the drawing of inferences admitted by the prosecution evidence, as tested in cross-examination, in my judgment, the prosecution has successfully adduced credible evidence proving each and every essential ingredient of the offences of abuse of position for gratification, CBT and money laundering as framed in the seven charges, in relation to any of which if unrebutted or unexplained, would warrant a conviction.

[1227]The key question this court must now ask, in light of the Federal Court decision in *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85 is whether upon a maximum evaluation of all the evidence at the end of the prosecution stage can it be said that on the available and credible evidence, should the accused elect to remain silent were I to call for his defence, am I prepared to convict him? The answer is in the affirmative.

[1228]A prima facie case has therefore been made out against the accused in respect of each of the single charge of use of position for gratification, the three CBT charges and the three money laundering charges within the meaning of s 180 of the CPC. As such I now call upon the accused to enter his defence in respect of all the seven charges.

[1229]The accused has three options. The accused must decide on one of the three options. He may choose to give sworn evidence in the witness box where he will be subject to cross-examination. The accused may elect to give an unsworn statement from the dock where he cannot be cross-examined or that he may choose to remain silent, in which case this court must proceed to convict the accused.

THE DEFENCE CASE

Duty of the court at the conclusion of the trial

[1230]On 11 November 2019 I ruled that at the end of the prosecution case, the prosecution had successfully established a prima facie case against the accused on all seven charges and ordered that the accused enter his defence.

[1231]The duty of a trial court at the end of the defence case and conclusion of trial is set out in s 182A of the Criminal Procedure Code whereby the court must consider all the evidence adduced before this court to decide whether the prosecution has proved its case beyond reasonable doubt.

[1232]The Court of Appeal in the case of *Prasit Punyang v Public Prosecutor* [2014] 4 MLJ 282; [2014] 7 CLJ 392, in the judgment of His Lordship Azahar Mohamed JCA (now CJ (Malaya)) importantly held:

> In accordance with the provisions of s 182A(1) of the Criminal Procedure Code, it is the bounden duty of the learned JC, at the conclusion of the trial, to consider all the evidence adduced before him and shall decide whether the prosecution has proved its case beyond reasonable doubt. The Legislature has advisedly used the term all the evidence. The emphasis must be on the word all.

[1233]In addition the correct process that must be performed by a trial court in the assessment and evaluation of the defence evidence is that as encapsulated in the long standing decision of Suffian J (as he then was) in *Mat v Public Prosecutor* [1963] 1 MLJ 263, where it was stated as follows:

> The position may be conveniently stated as follows:
>
> (a) If you are satisfied beyond reasonable doubt as to the accused's guilt
>
> Convict.
>
> (b) If you accept or believe the accused's explanation
>
> Acquit.
>
> (c) If you do not accept or believe the accused's explanation
>
> Do not convict but consider the next steps below.
>
> (d) If you do not accept or believe the accused's explanation and that explanation does not raise in your mind a reasonable doubt as to his guilt
>
> Convict.
>
> (e) If you do not accept or believe the accused's explanation but nevertheless it raises in your mind a reasonable doubt as to his guilt
>
> Acquit.

[1234]The approach in *Mat v Public Prosecutor* was endorsed by the Federal Court as being the correct one to adopt when evaluating the evidence of the defence case in *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457.

[1235]Further, if a statutory presumption has arisen as it has here, it is incumbent on the accused to rebut such presumption on a balance of probabilities in order to secure an acquittal (see *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89, a Privy Council's judgment on an appeal from Malaysia delivered by Lord Diplock).

Whether late service of the witness statement of the accused at commencement of the defence case objectionable

[1236]The defence began its case on 3 December 2019 with the defence opening statement and called the accused as its first witness, in adherence to s 181(1) of the CPC, given that the accused had chosen to give sworn testimony. But the prosecution complained that the witness statement of the accused, a sizeable 243-page document containing answers to 317 questions was only served on the prosecution the same morning of the opening of the defence case.

[1237]The learned attorney general submitted that this would run counter to the whole purpose of s 402B of the CPC on the use of written witness statements designed to speed up the trial process, as well as provide notice to the other side. Since the prosecution only received the witness statement on the same day, and that the prosecution had also prepared its cross-examination without the benefit of the witness statement, the prosecution's strategy on its cross-examination of the accused may be affected.

[1238]In reply, the defence informed the court that the team had little time since the decision of this court to call for the defence on 11 November 2019. This is true but in my view could not justify the late service of the witness statement as the date on the start of the defence had been fixed very much earlier, when the case of the prosecution closed in late August 2019.

[1239]The relevant parts of s 402B of the CPC reads as follows:

> 402B Proof by written statement
>
> (1) In any criminal proceedings, a written statement by any person shall, subject to the conditions contained in subsection (2), be admissible as evidence to the like extent as oral evidence to the like effect by that person.
>
> (2) A statement may be tendered in evidence under subsection (1) if —
>
> (a) the statement purports to be signed by the person who made it;
>
> (b) the statement contains a declaration by that person to the effect that it is true to the best of his knowledge and belief; and
>
> (c) *a copy of the statement is served, by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings not later than fourteen days before the commencement of the trial unless the parties otherwise agree.*
>
> ... (Emphasis added.)

[1240]This provision is designed to expedite the criminal trial process by permitting the substitution of oral evidence with that of a written statement. The prosecution and the defence are thus allowed to tender written statements in the form of evidence during examination-in-chief. These statements will have effect as though the evidence is oral evidence given during trial.

[1241]Consent of any of the parties to the proceedings is unnecessary before a party can tender a witness statement under this provision subject only to the fulfilment of the conditions of admissibility stated under sub-s (2). These are the preconditions that must be met before the written statements can be admitted (see the Court of Appeal decision in *Mahdi Keramatviyarsagh Khodavirdi v Public Prosecutor* [2015] MLJU 14; [2015] 3 CLJ 336).

[1242]An important condition for the use of written statements, for present purposes, is contained in s 402B(2)(c) which is to be construed as requiring the written statements to be served on the other party not later than 14 days before the witness in question is called to give his testimony.

[1243]Even though the provision in sub-s (2)(c) refers to 14 days before the commencement of trial, this may be quite impractical as even the defence would otherwise be obliged to serve the same (if it wishes to rely on such written statements) even prior to commencement of trial. This means that the defence must have the evidence of his probable witnesses ready for service even before the prosecution opens its case which would sit very uncomfortably with the trite law in s 180 of the CPC that the prosecution must first establish a prima facie case against an accused before defence is called.

[1244]In my view a more legally workable construction should refer the requisite 14 days, as for the defence case, the period prior to the date the first defence witness is to testify, or that in all cases, the period of 14 days should more practically and meaningfully be before the witness whose statement is to be served is scheduled to give evidence in court.

[1245]Now in the case before me the 14 days' requirement was in any event clearly not satisfied. But the prosecution nevertheless provided its agreement to waive the 14-day service condition. This was possible because the same sub-s (2)(c) states that the 14-day period is to operate 'unless the parties otherwise agree'.

[1246]However, given that the very voluminous written statement of the accused was given to the prosecution only on the very day the accused was to testify, I informed the prosecution that upon its application, adjournments may be granted (which I did) — for a reasonable period — to enable the prosecution to better prepare for its cross-examination of the accused.

The essence of the defence of the accused

[1247]The crux of the defence of the accused which do overlap in the different charges, not least because of the RM42m from SRC featured in the abuse of position under s 23 of the MACC charge, and collectively in the three CBT

and the three money laundering charges, may be stated in the manner summarised by the defence in its written submissions, in the following paragraphs. My analysis which follows will examine these in turn and will also evaluate other specific and related arguments raised by the defence throughout the rest of this judgment.

In respect of the abuse of position charge under s 23(1) of the MACC Act

[1248]The defence submitted that the decision approving the setting up of SRC was made by EPU without compulsion. The motivation and the impetus for the approval was towards ensuring continuous security of the supply of energy to meet the requirements of the nation. This was an important national area of development as identified in the 10th Malaysia Plan and the National Energy Policy. Thus, the accused endorsed the said decision in furtherance of national interests.

[1249]All throughout the events relating to SRC's application for financing from KWAP and KWAP's consideration thereof and the processes in government, particularly in the Ministry of Finance leading up to the Cabinet's approval to provide the two government guarantees to guarantee the financing of the total amount of RM4 billion by KWAP to SRC, the accused had acted in pursuance of the national interests intended to be met through SRC's proposed activities. All due processes were complied with and at each stage at KWAP and at the MOF and subsequently at both Ministerial and Cabinet levels, decisions were made by all parties based on considerations to further the intended national interests.

[1250]Further, the accused participated in the Cabinet meetings in accordance with the usual processes in government and his actions were not to pursue any private interests. There was no cause to withdraw himself from the said meetings as there was no other interest held by the accused save that in pursuance of the government's initiatives. The same national initiatives were affirmed by the Cabinet unanimously in approving the provision of the said government guarantees.

[1251]In respect of the operations of SRC, the accused had not interfered with the board of directors' oversight over SRC's investments and affairs. At all times, the accused subscribed to the belief that the board of directors of the company were managing the affairs of SRC in the best interests of the company. In 2012, the accused approved of SRC to be brought under MOF Inc (MKD) directly in order to provide further oversight over SRC by the division overseeing MOF Inc's owned entities (BMKD) as was the recommendations of PW44 and the Cabinet's own decision in granting the second government guarantee on 8 February 2012.

[1252]The accused did not act corruptly or with any intention to obtain gratification from funds of SRC. Such action would be absurd given that SRC was an MOF Inc. company and such transactions would be easily discoverable.

In respect of the CBT and money laundering charges

[1253]The defence submitted that the accused had never instructed any director of SRC including Nik Faisal on transactions relating to funds of SRC being transferred out of SRC and into his accounts in 2014 and 2015 including the RM42m transactions specified in the charges.

[1254]At all times the accused believed that the funds in his personal accounts in 2014 onwards were from further donations being made to him by the Arab royalty as had been the case since 2011 and originated from personal assurances by the late King Abdullah himself. This belief was fortified inter alia by the intimation from Jho Low who was held out and had reasonably been perceived as being an associate of the Arab royalty. The donations were further evidenced by supporting letters (D601–D604) which the accused understood were fully reported to AmBank, the Central Bank (BNM) and its Governor.

[1255]Since the prevailing circumstances in 2014 in relation to the intimation of further donations being made appeared to be the same as had been the case in relation to substantial donations received by the accused for the preceding three years since 2011, the accused therefore continued to utilise the funds in consonance with past practice.

[1256]The exact transactions in the accounts were in any event not known to the accused because he was only generally told about the sufficiency of funds on an ad hoc basis by his late principal private secretary, Datuk Azlin Alias. Nothing arose at the material time which would have led to reasonable suspicion that the circumstances were different from past years. This included the fact that cheques issued by the accused continued to be honoured.

[1257]The use by the accused of funds in the accounts since 2011 were not towards personal enrichment or wealth but were for CSR initiatives, being political, social, community and charitable causes as well as for the General Elections in 2013. After all, the utilisation of the funds for the elections was in line with King Abdullah's wish for the accused to continue leading the Government and Malaysia's stability being preserved.

[1258]As such, the accused had no knowledge of the RM42m transactions that flowed into his account or knowledge that the same were from the account of SRC.

The charge for abuse of position under s 23 of the MACC Act

The thrust of the defence of the accused

[1259]I observe that the arguments revolving around the proposition on national interest have been raised earlier by the defence at the end of the prosecution case. This time however the accused himself testify to seek to further clarify the same. These are therefore already largely familiar arguments which have been previously addressed, in which event, I shall not repeat the entire analysis of the issues again. It suffices that focus be made on new emphasis of matters which are adduced by the defence witnesses, including the former Secretary General of the Treasury (DW3) who succeeded PW45, as well as the former attorney general (DW14).

Whether the findings of the former attorney general cleared the accused

[1260]The defence submitted that its case is consistent with that which was made by the former attorney general (DW14) in the press statement released at a press conference on 26 January 2016 (D780) which contains the determination of DW14 in respect of the allegation of the commission of an offence under s 23 of the MACC Act as follows:

(a) there are no evidence to show that YAB PM has abused his position during the Cabinet Meeting which approved the government guarantee on the RM4 billion loan to SRC International from Kumpulan Wang Persaraan (Diperbadankan) (KWAP);

(b) evidence also show that the loan approval process by KWAP and the loan guarantee approval by the Cabinet were properly done;

(c) there are no evidence to show that YAB PM had solicited or was promised any gratification from any party either before, during or after the Cabinet decision was made;

(d) the evidence as a whole does not disclose any conflict of interest on the part of YAB PM; and

(e) MACC itself admitted that based on their investigation, there are no evidence from the witnesses that could show that YAB PM had committed any act of corrupt practice.

[1261]Tan Sri Mohamed Apandi Ali (DW14) was a former Attorney General of Malaysia. He was appointed the attorney general on 27 July 2015 replacing Tan Sri Abdul Gani Patail. This appointment was effected in the same month the investigations into the RM42m SRC funds commenced.

[1262]Tan Sri Dzulkifli Ahmad (DW17) a former Chief Commissioner of the

MACC was in 2015 a deputy public prosecutor and a senior member of the Attorney General's Chambers ('AGC') with experience in commercial crimes and corruption cases. DW17 testified that in December 2015 a review of the MACC's investigation papers ('IP') on the RM42m SRC funds which are the subject matter of these proceedings was undertaken by members of the AGC headed by DW17 under instructions of the then attorney general (DW14).

[1263]In my judgment, it cannot be said that the evidence of DW14 and the press statement (P780) and for that matter, the testimony of DW17 who played a key role in assisting DW14 in the review of the IP from MACC advance the case of the defence in rebutting the prosecution case or in casting a reasonable doubt in the case of the prosecution.

[1264]This is because both DW14 and DW17 in their evidence admitted in cross-examination not to be aware of further investigations undertaken by the MACC subsequent to the announcement of 26 January 2016 to NFA the IP, where according to lead prosecutor, statements were recorded from 76 new witnesses as well as further statements taken from existing witnesses. Both PW14 and PW17 were also not aware of the evidence of admission of knowledge contained in the affidavit affirmed by the accused in a defamation suit.

[1265]It is thus undeniable that the charge under s 23 of the MACC too subsequently had the benefit of additional evidence which was not previously available at the time the announcement was made by the attorney general to NFA the investigations. The findings in press statement (D780) could not have been conclusive then, even though PW14 rightly acted on the premise they were, because they were based on the evidence gathered by the MACC and disclosed in the IP at that time.

[1266]In other words, even though PW14 and PW17 decided that the investigations had by then been completed based on what had been gathered by MACC as recorded in the IP, for the purpose of this instant or any trial, any pronouncement of this court must be based on evidence produced to the court trying the case. It cannot, for example, be based on the findings of even the attorney general who as the public prosecutor moved to file the criminal charges in the first place. To put it simply, the opinion of DW14 and DW17 cannot replace the evidence before this court to arrive at its decision.

[1267]It is also to be noted that after all it is not wrong for the enforcement agency to carry on with the investigation even during the course of a trial such as for the purpose of procuring witnesses to tender certain exhibits. In the instant case the MACC reactivated and continued with its investigation, as is

usual, before charges were preferred against the accused. The court should after all only be concerned with evidence to see if it is admissible, not when or how such evidence is obtained (see the Supreme Court decision in *Ng Yiu Kwok and Ors v Public Prosecutor* [1989] 3 MLJ 166).

[1268]Furthermore, it bears emphasis that in any event as the matter has now been translated into a formal criminal charge under s 23 of the MACC Act, it is for the court to determine whether or not an offence as framed in the charge has been proved beyond reasonable doubt based on all the evidence made available in this trial.

Whether it was the accused who set up SRC

[1269]The defence argues that the approval for the setting up of SRC was singularly dependent on EPU's own study and recommendation, and that the views of EPU as contained in its memorandum (P357) squarely coincide with the accused's own views on the matter, especially on the risk of over-reliance on oil and gas resources. SRC was therefore a means by which the nation may begin to create a stockpile in energy resources to address the mid-term so that the country could start to look at alternative energy sources for the long term.

[1270]To put in proper context, the testimony of PW28, the author of the EPU memorandum was referred to by the defence which submitted that it further attested to the timely necessity of SRC being set up to meet the nation's energy planning requirements according to the 10th Malaysia Plan. According to the notes of proceedings dated 2 May 2019 — PW28:

> S: Finally now we come to P357. This was then the final version of the memo which the Energy Section prepared and the Ketua Pengarah EPU signed up?
>
> J: Yes.
>
> S: Just before I get into this, would you be familiar with 10th Malaysia Plan which amongst others provided that the supply of high quality energy on a cost-effective basis was an important factor to attract foreign investors to the country?
>
> J: True, because it will cut down and reduced the operating cost.
>
> S: There was also this Dasar Tenaga Negara which had an emphasis to ensure, as you mentioned, security of energy resources at affordable price, that's correct?
>
> J: Security of the energy resources prices, but that affordable price is something that we will focus, we quite focus on. But whether in the policy at affordable prices, I cannot recall.
>
> ...
>
> S: Ultimately then from this memo if I understand it, it reflects that the EPU was in support of the setting up of this company?

J: EPU was in support of setting up the company because we were thinking along the line of the energy security because if you were to look at the notes here, there were plans in the 10th Malaysia Plan to set up 2 big coal plants of 10,000 Megawatts in 2015, and it was during the 10th Plan.

S: They have taken up several resources which they thought was strategic and possibly effecting security of the nation in that sense and they have made some proposals?

J: Yes.

S These proposals, you agree, were seriously considered by the EPU, by your division?

J: Yes, and in fact there were also internal discussions to consider the proposal. We also included actually another section which is the industry section whereby a lot of industries are dependent on energy. So that's why we were not just looking at the supply side. In my sector, it was looking more on the supply side to ensure that it is an energy security. But we also shared this with industry section which was more concerned with the demand side because they in charge of the manufacturing sector and other sectors that require energy.

S: So both supply and demand were factors seriously considered and discussions were seriously held?

J: Yes.

S: Generally speaking this proposal by 1MDB in this letter was not some kind of hair brain scheme. It is a serious proposal made to the EPU?

J: In my opinion it would be a serious proposal if you submit it to the Prime Minister of Malaysia and a copy to EPU. If it is not serious then I don't think an entity would submit it to the Prime Minister to proceed.

...

S: But I have seen but I'm sure you have seen more, there are some schemes which can't even pass the post that has gone into EPU, which of course EPU rejected?

J: Gone to EPU? Yes.

S: EPU has rejected because some of this do not even pass the post, do you agree?

J: Yes.

S: This is not one of them. This is a serious proposal. That is the point that I'm making.

J: I would consider that, yes.

[1271]The evidence of Tan Sri Dr Irwan Siregar (DW3) the former Secretary General of the Ministry of Finance who succeeded Tan Sri Wan Aziz (PW45) is also said by the defence to be supportive of its case. The defence refers to the Notes of Proceedings dated 5 February 2020 — DW3, as follows:

S: You had served 11 years in the energy section of the EPU. Now asking about the role of the energy section of the EPU generally, could you explain what it was?

J: They do the, you know, the energy requirement for the country. You know, long term requirement. In terms of security of energy supply, you know, there was a policy, you know, first for fuel policy then came five fuel policy, you know, because the country is dependent on oil, gas, hydro and also coal. At one point of time, we were over dependent on oil and gas. So in terms of security, you need to diversify your energy resources. That's why we came out with the 5th energy that is the renewable source of energy. Solar and so on. So, security of energy supply is very important if you look at the history in 1983, there was a huge blackout where the reserve margin of electricity supply went below 25% of the required reserve margin. And that's why, you know, energy became so important you know, both for industrial activities, household activities, commercial. If no electricity, nothing is moving. So blackout, that blackout really you know, opened eyes and that's where energy planning became one of the crucial in the five year plan and that's why I suppose in 2011, you know, in the 10th Malaysia Plan, they put energy as one of the main thing, where else security of supply and also at a reasonable cost.

S: One of the main things, sir, you know, just that hearing the manner in which you're giving evidence, I can see that you are very passionate about the your service and I am very grateful for that sir. I think we all are. I believe this next question is blatantly obvious to you. The answer is blatantly obvious to you, but for neophytes like us, could you explain how is it that the energy policies and initiatives play a key part in the development of Malaysia as a nation?

J: Like I said, you know, energy supply is one of the crucial element in industrial development and also for economic growth even in other countries also they give focus to electricity and energy sector. Of course, energy you know, if you go technically you know there is primary energy, secondary energy and so on. I don't want to go detail on to that part but you know, for the country to grow, the energy supply must be you know, sufficiently enough and at reasonable price, because some industry they want to come in, because cheap electricity is provided to them. You know, for example huge aluminium smelter and so on. If you want to attract foreign industry, you need to provide you know, uninterrupted electricity supply and also at cheap cost. So these are the elements you know, where you know, when we draw out plans, you know, we need to identify which plant in planting up programmes. Planting up means, you know putting up new plants and in which areas, in strategic areas. These are the planning where EPU together with other ministries, relevant ministries such as KeTTHA. KeTTHA is the Ministry of Energy, Water, Telecommunication at that time. Now I don't know what is the acronym for Ministry of Energy. So, KeTTHA and EPU together with Energy Commission will sit down you know in an inter-agency planning group and plan for the future. What kind of power plant? What kind resources we are going to use? We don't want to become over dependent on gas you know because Petronas also restricted in terms of supply of gas and what cost we want to buy the gas and oil. So all this things you know, planning will be done in terms of moderning exercise and everything. We will present it to the Cabinet at a later part.

[1272]The defence also made a reference to the testimony of another prosecution witness, Dato' Mat Noor Nawi (PW44), a former deputy Secretary General of the MOF. According to the notes of proceedings dated 9 July 2019 — PW44:

> S: Dato' has had I think quite a bit of experience in both private companies, public listed companies, government linked companies and government service?
>
> J: Yes.
>
> S: Specifically in EPU itself?
>
> J: Yes.
>
> S: Dato', the EPU is the department in the Prime Minister Office that place a very integral role in come out with Rancangan-Rancangan Malaysia?
>
> J: Yes.
>
> S: The EPU also has a very integral role in coming out with Dasar-Dasar Pembangungan Negara?
>
> J: Yes.
>
> S: I don't know whether Dato's memories will hold, does Dato' remember that under the 10th Malaysia Plan, which was in existence 2011 onwards, one of the key areas of focus of the country was the sourcing of a continuous supply of cost efficient energy?
>
> J: Yes.
>
> S: That was also something that was consistent with the Dasar Tenaga Negara?
>
> J: Yes.
>
> S: This document, or I say policy, the Rancangan Malaysia or whatever version of the Rancangan Malaysia and the Dasar-Dasar Pembangunan, this would be things that have approved by cabinet?
>
> J: Yes.
>
> S: Dato' knows from the many years Dato' spend in the civil service, in Malaysia, it is the cabinet that is the ultimate policy decision maker?
>
> J: Yes.

[1273]In fact the defence even refers to the statement of Nik Faisal given to MACC, as dated 17 October 2015 (D807) where it is stated that the idea for the setting up of SRC was Nik Faisal's and it was put to the accused in a face to face meeting which was organised by the latter's principal private secretary while Nik Faisal was working at 1MDB. In response to Nik Faisal's presentation, the accused had commented, 'looks good and do the right thing'.

[1274]The point being made by the defence here is that the evidence given by these witnesses, taken together show that the setting up of SRC was a desirable and timely initiative in line with the publication of the RMK-10 (2011–2015) or the 10th Malaysia Plan and the Dasar Tenaga Negara (2011–2015) or the National Energy Policy.

[1275]Significantly, it is submitted that the evidence as a whole supports the inference that the setting up of SRC was based upon the recommendations of the EPU who had made their findings independently and not under any compulsion, and that the EPU's rationale in recommending the setting up of SRC was in pursuance of legitimate national interests as outlined in the RMK-10 and the National Energy Policy. And this means that the accused's actions were motivated by public interest considerations consistent with his role as the Prime Minister and the Finance Minister, and nothing else.

[1276]In my evaluation, there is no denying that EPU did support the establishment of SRC for the reasons that it would be in line with the energy plans and requirements of the nation. It is also true that EPU had employed its internal energy experts to assist with the final recommendations in the memorandum (P357). But despite the matter being in the 10th Malaysia Plan, the impetus for the proposal to actually initiate what was embedded in the plan came from someone associated with 1MDB, not the government.

[1277]Even though I do not give any weight to the MACC statement of Nik Faisal (D807) on account of him being an interested person who is accused of having played a key role in the transactions referred to in the charges against the accused, and the fact that he is unavailable to be cross-examined, in that statement of his, Nik Faisal did claim that the setting up of SRC was his idea, which had even been discussed with the accused.

[1278]Nevertheless, the status of Nik Faisal as a close associate of the accused makes his statement inherently improbable to be believed especially considering his pivotal role in relation to SRC and GMSB and in the management of the accused's three private accounts directly relevant to the charges against the accused.

[1279]Regardless, it is patently clear that the idea or proposal did not originate from some government agencies or Ministry. Only that the 1MDB letter was addressed to the Prime Minister. Because of that PW28 testified that EPU deemed the request from SRC ought to be taken seriously. Which it did. EPU was supportive of the setting up of SRC, as I just mentioned.

[1280]However, EPU was almost wholly dismissive of the 1MDB's request for a grant of RM3 billion to set up and operationalise SRC. I think it would be fair

to assume that if the proposal had been formulated by a government agency or Ministry, a critical matter such as the funding requirements would have been fully thought through, and if recommended by the relevant Ministry, the matter be further progressed to be escalated to the Cabinet. But not for this proposal for the establishment of SRC.

[1281]In my view it is not incorrect for the prosecution to argue that whether or not the accused instructed the incorporation of SRC is irrelevant to the case before this court. It had been earlier established by evidence that the accused has personal and private interest in SRC, as is clearly seen from and made possible by his control and dominion over the SRC board of directors, the specific powers granted to the accused in the provisions of the M&A of SRC, his appointment as the advisor emeritus of SRC, and full control of the ownership of SRC as the MOF Inc.

[1282]The involvement of the accused in the incorporation of SRC is only one aspect of the facts of the case when compared to the totality of the evidence adduced against the accused. The landmark case on circumstantial evidence of *Sunny Ang v Public Prosecutor* [1966] 2 MLJ 195 clearly illustrates the importance of evaluating the cumulative effect of all evidence against an accused and not just placing undue importance on one aspect of the facts independently against the rest of the evidence. It was held that:

> It was also contended that the learned trial judge erred in law in failing adequately to direct the jury on the danger of convicting an accused person upon circumstantial evidence. There are two passages in the summing-up which are relevant in this connection. The first passage, which comes after the direction in which the learned trial judge deals with what he refers to as the first question of the cumulative effect of circumstantial evidence, is as follows:
>
> > The second question to which I must draw your attention is that the question in this case, depending as it does on circumstantial evidence, is whether the cumulative effect of all the evidence leads you to the irresistible conclusion that it was the accused who committed this crime. Or is there some reasonably possible explanation such, for example — 'Was it an accident?'.
>
> The second passage is as follows:
>
> > Now, as I told you earlier on, one of the points about circumstantial evidence is its cumulative effect. Any one of these points taken alone might, you may think, be capable of explanation. The question for you is: where does the totality of them, the total effect of them, all lead you to? Adding them together, considering them, not merely each one in itself, but altogether, does it or does it not lead you to the irresistible inference and conclusion that the accused committed this crime? Or is there some other reasonably possible explanation of those facts?
> >
> > The prosecution case is that the effect of all this evidence drives you inevitably and inexorably to the one conclusion and one conclusion only: that it was the

A accused who intentionally caused the death of this young girl.

In our opinion, these directions are perfectly adequate in a case where the prosecution are relying on circumstantial evidence.

B **[1283]**I must add that this emphasis on evaluating each strand of circumstantial evidence is imperative when the case against an accused relies almost entirely on circumstantial evidence. That is not the case before me where the prosecution has adduced direct evidence against the accused as well.

C **[1284]**In any event, even if the accused was not singularly responsible for the setting up of SRC, the more pertinent point is that the approval for the establishment of SRC by the accused provided the true starting point for the involvement of the accused in the company.

D Whether KWAP financing is contrary to EPU recommendations

[1285]The defence nevertheless argued that while it is true that the EPU memorandum (P357) had only agreed to provide a launching grant of RM20m, it did not restrict SRC from seeking loans elsewhere in the market. In E fact, the memorandum quite comprehensively spells out under the heading 'Permohonan geran daripada Kerajaan berjumlah RM3 billion' at p 4, that:

Permohonan geran daripada Kerajaan berjumlah RM3 billion tidak disokong di mana secara prinsipnya sebarang pelaburan tidak seharusnya dibiayai daripada F geran. Walau bagaimanapun bagi membolehkan kerja-kerja awal SRC dilaksanakan oleh 1MDB, dicadangkan peruntukan sebanyak RM20 juta disediakan sebagai *launching grant*. Bagi membiayai pelaburan SRC, opsyen lain seperti mendapatkan pinjaman bank komersil, *joint venture* dengan syarikat swasta atau penerbitan bon boleh dipertimbangkan oleh 1MDB. Ini penting dalam memastikan wujudnya kesamarataan persaingan antara GLC dan sektor swasta tanpa layanan istimewa G kepada GLC. Keserataan persaingan ini harus dipelihara bagi memastikan persaingan adil untuk semua pihak.

[1286]It is submitted by the defence that the EPU had never in fact expressly H excluded KWAP as a potential lender from its recommendations and to read it as such puts an unjustifiable strain on the language used. This is wide enough as to include KWAP as a potential lender in the subjective understanding of the accused, as he testified.

I **[1287]**The defence also asserted that PW28 too confirmed that the basis of EPU declining of the RM3 billion grant was because EPU intended SRC to obtain financing through loans on a commercial basis. In the notes of proceedings dated 2 May 2019 — PW28:

S: No 3, in relation to your RM3billion grant we denied it?

J: Yes.

S: You straight away say, no, RM3billion, no. Why? You said it because you want them to be competitive. They should go into the market and get their loans on commercial basis. That is the notation that you made in your memo among other things?

J: Yes.

[1288]The defence contended that there was no encumbrance upon SRC seeking financing from KWAP which it subsequently did by way of the SRC letter dated 3 June 2011 (P364). The restricted interpretation given to the EPU memorandum by the prosecution does not accord with the scope of potential creditors contemplated by EPU. As such, the accused's consequent support for SRC to apply for a loan from KWAP was therefore not contrary to EPU's recommendations.

[1289]I have earlier at the end of the prosecution case pointed out two observations from the evidence concerning the request by SRC made to KWAP. Having considered these present arguments of the defence, I find my earlier findings to continue to be applicable. First, PW28 was unequivocal when she testified that it would have been negligent of EPU to accede to the request for a massive grant by 1MDB, in favour of SRC, an entity with no track record, in an application set out in a three-page letter, because RM3 billion constituted a significant portion of the whole national development budget for the country.

[1290]Secondly, KWAP is first and foremost a statutory retirement pension fund. As part of its management of the fund, the law permits the investment panel to extend loans. The EPU memorandum stated that SRC could consider obtaining financing from commercial banks, private joint venture or bonds issuance. It is patently obvious that KWAP is none of any of these broad categories. Thus this argument of the defence is unsustainable.

[1291]But KWAP, a statutory agency under the Ministry of Finance is especially unique in this context given that its chairman of the board must also by the operation of law under s 6 of the Retirement Fund Act 2007 be the Secretary General of the Ministry of Finance, an office which reports directly to the Finance Minister.

Whether there was never any instruction but mere requests that must still follow due process

[1292]The starting point was the SRC letter to the accused dated 3 June 2011 (P364) requesting for his approval for SRC to obtain an RM3.95 billion loan

A from KWAP. The minute by the accused on the SRC letter agreed to the request, and was addressed to the CEO of KWAP (PW38).

[1293]The accused testified that he had lent his backing to SRC's initiatives because those initiatives were in line with the RMK-10 and the *Dasar Tenaga Negara*. The defence asserted that it would be exceedingly naïve to automatically equate mere enthusiasm with a corrupt motive, especially when the accused's enthusiasm is backed by EPU's own recommendations in the memorandum (P357).

[1294]The accused said that it was not his intention to instruct PW38 to blindly issue out the loan to SRC on the basis of the letter, nor was it his explicit instruction to Datuk Azlin to meet with PW38 after office hours at KL Hilton. The accused was fully cognisant of the fact that PW38 was but an ex officio member of the investment panel of KWAP and thus had no powers to approve the loan. Notwithstanding his minute indicating his approval on the SRC letter (P364), the accused maintained that he was at all times fully aware that the legal authority to decide on the loan is vested in KWAP investment panel.

[1295]The accused had in mind the fact that his agreement was always subject to KWAP adhering to its internal processes. In the notes of proceedings dated 3 February 2020 — DW1:

> S: Okay, I invite you to question 39 at page 30, when you mentioned, in fact this has been when you agreed or you wrote 'bersetuju' in the letter, you were in agreement for the loan of 3.95 billion to be given to KWAP, I am putting it to you? You agree or disagree?
>
> J: Bila saya kata bersetuju, saya bererti bahawa ia memulakan proses.
>
> S: No, you were in agreement that's all I am saying.
>
> J: Subject to KWAP's discretion.
>
> S: I'm saying you saying subject to, I'm saying as PM, as Finance Minister with Tan Sri Wan under you, KWAP all under you, you by writing the word *setuju*, you ensured that this loan was granted?
>
> J: Subject to the discretion of KWAP.
>
> ...
>
> J: What I meant was that this would start the process to consider the request by SRC. It doesn't mean that I was going to override the powers of the Investment Panel. I know according to the law, the Investment Panel has the absolute authority to decide and that's by law. So, as a Minister I cannot override that. The other thing is I do expect KWAP to decide on its merit and I believe if my memory serves me correct, Tan Sri Wan Aziz in his testimony said that KWAP decided on a basis of merit and they were not under any pressure to approve the loan. As it stands, according to the letter they asked for a clean loan of RM3.95 billion. But they didn't

get the RM3.95billion. So, it was never deemed to be an instruction but it was up to the Investment Panel to decide what will be the appropriate amount.

S: Yes sir. Now, the statement that you've made, 'mungkin mereka nak cari jalan yang pintas', that is aptly to be misunderstood.

J: Yes.

S: Now my question to you is, did you see anything wrong in writing to Dato' Azian in this fashion when in fact SRC was the applicant for the loan and therefore as you had conceded, normally the applicant would be writing to KWAP?

J: No, I don't think there was anything wrong with it because they still would have to go through the requirements as stipulated under the law, which is for the Investment Panel to decide. So even if they were, in this case they wrote to me but the process as determined by the law must be followed.

[1296]The accused agreed in cross-examination that he was PW38's ultimate boss but with the caveat, *subject to due process*. He further emphasised the fact that despite his endorsement on the SRC letter (P364), the investment panel of KWAP first arrived at the position to offer up to RM1 billion only instead of the RM3.95 billion requested for in the said SRC letter. The accused admitted that PW45 and PW38 met him to inform him of this matter. Subsequently the accused said that he did meet with PW45 but had merely asked PW45 to arrive at a decision quickly so that SRC may either proceed with its investments should KWAP be agreeable to provide a loan up to the revised amount of RM2 billion or that SRC may begin looking elsewhere should KWAP not be agreeable to provide the revised amount.

[1297]The testimony of the accused further included that his minute on the SRC letter (P364) should not be interpreted as an instruction to PW38 since she had also placed SRC's application through its usual process, as she would, as the CEO of KWAP, do for any other application.

[1298]Further, KWAP's initial position to grant only RM1 billion is also in consonance with the independence of KWAP's own internal processes. Crucially, according to the defence, this decision was revisited in light of SRC's revised application which was made before the second conversation between the accused and PW45, who had testified that he did not interpret the request from the accused to mean that KWAP had no option but to grant RM2 billion as requested. The defence submitted that in fact, in his testimony, PW45 had stated that SRC's renewed application for RM2 billion had satisfied KWAP on merit, having gone through all the normal processes, observing that even after that conversation with the accused, PW45 was of the view that the KWAP investment panel may very well have ultimately decided on a loan of up to only RM1 billion.

[1299]In addition, the defence contended that DW3's evidence and recognition of national interest projects supports PW45's own evidence that SRC's objectives were in line with the national interest. At the same time, PW45 had made the crucial observation that the investment panel would not have granted the RM2 billion financing to SRC were it not in KWAP's interest to do so.

[1300]The defence thus argued that the accused's conversation with PW45 supporting SRC's initiatives was in line with his public duty to ensure that initiatives favourable to the government are brought to the fore. Thus a re-evaluation of the prosecution's case against that of the evidence led by the defence is imperative. The only proper conclusion to draw is that KWAP were in no way influenced by the accused's minute upon the SRC letter (P364) or the accused's subsequent conversation with PW45.

[1301]Again, I must stress that this argument has been raised at the end of the prosecution case. I accept that neither PW45 nor PW38 said that they felt compelled to accede to the request for the RM3.95 billion loan request as stated in the accused's minute on the SRC letter (P364).

[1302]The defence however misses the point. There is no dispute that the process at KWAP, MOF and the Cabinet were all, albeit rushed, generally adhered to. The relevant party entrusted with the approving authority made the decisions, not the accused. That has been established. The point of contention is the series of conduct and decisions made by the accused vis a vis the top officials in KWAP and MOF concerning the financing and the government guarantee, including his participation at the relevant meetings of the Cabinet, without which the financing and the guarantee would not have materialised.

[1303]The issue vis a vis the accused's minute on the SRC letter to PW38 and his conversation with PW45 is not whether there was an instruction that must be followed. As stated in the case of *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1 referred to earlier, the true test would be whether the act done would have been done or could have been effectively done if the person in question were not holding the kind of position of status or authority that he in fact was.

[1304]In the instant situation, both PW38 and PW45 were appointed into their positions in KWAP by virtue of the exercise of the authority of the Finance Minister. And PW45, as the Secretary General of the Ministry of Finance directly reports to the Finance Minister. Thus, at all material times, the accused held a position of a superiority over those he had made his 'requests' and therefore had a considerable degree of influence (acknowledged by PW38

in her testimony) over the decisions made by the witnesses in question who were for all intents and purposes subordinates of the accused. In addition, the 'requests' too were in any event written (to PW38) and enunciated (to PW45) in unmistakably clear terms.

[1305]I emphasise that in this case it is not just that the accused was the 'ultimate boss'(as remarked by PW38) to witnesses such as PW45 and PW38. Given his position, an argument could be made that the accused would be the 'ultimate boss' to the more than one million in the civil service and other statutory institutions. The accused himself in his testimony more or less accepted this, with the big caveat, 'subject to due process'.

[1306]However, the key is that the accused had engaged in a series of conduct and made decisions in his dealings and interactions with his 'subordinates' which were outside that remit of due process. The accused could now claim that these requests were not instructions and that they were not compelled to follow them. PW45 and PW38 too said they did not consider these as instructions that must be followed. After all they too were under the obligation (such as imposed under the relevant government regulation and the Retirement Fund Act 2007) to consider such matters on their merits.

[1307]It is indubitable that the evidence demonstrates the influence of such requests on PW38 and PW45, as shown earlier. Crucially, the strongest indication of the influence that the said conversation had on PW45 is that PW45 had subsequently told PW38 about it and even made sure that the request by the accused to PW45 was formally conveyed to the meeting of the investment panel, as subsequently recorded in the minutes of the meeting. For the second financing, it is worth repeating my finding at the end of the prosecution case that this paper to the investment panel is especially specific in stating in para 3.2 on the background of the proposal in the following clear terms:

> 3.2 The Government had approved the Guarantee on 16 February 2012 while the Minister of Finance had subsequently approved and advised for the Additional Facility to be procured from KWAP as KWAP is the financier to the Original Facility ...

[1308]This statement was further recorded at para 4.11 in the minutes of the investment panel meeting (P476). It was stated in the minutes of the meeting of the investment panel of KWAP on 20 March 2012 (P476) which approved the second financing of RM2 billion to SRC that the Minister of Finance had approved and advised for the additional RM2 billion to be procured also from KWAP as KWAP was the financier to the first facility at comparable terms with the first RM2 billion.

[1309]As such, in similar fashion like in the first financing of RM2 billion, the meetings of the investment panel which deliberated on the proposals were notified, even officially as stated in the papers and recorded in the respective minutes, of the position of the Prime Minister and Finance Minister on the requests from SRC. For the first financing, PW38 as the CEO of KWAP updated what the accused conveyed to the KWAP Chairman and chairman of the investment panel (PW45) on the amount of RM2 billion being sufficient (despite the accused being told by PW38 and PW45 that the investment panel had wanted to approve only RM1 billion) and for the matter be expedited by KWAP. In the second financing, the paper to the investment panel made it clear that the accused as the Minister of Finance had approved the request be made to KWAP again. No doubt in truth, the accused had approved in his capacity as MOF Inc being the shareholder of SRC, but MOF Inc, as I have stated earlier, under the lawis the Finance Minister.

[1310]Yet, the views or stance of the accused on the loans requests by SRC, even as the Prime Minister, is wholly irrelevant to the process of determining whether approval for the financing should be granted, with the Retirement Fund Act 2007 vesting that approving authority exclusively in the investment panel. s 7(1) makes it explicit that the investment panel is responsible for matters pertaining to the investment of the fund. Under s 7(4), the involvement of the Finance Minister is only on general and policy matters and also in indirect fashion as it states that the investment panel shall be subject to such directions as to general policy that may be issued by the Board of KWAP and approved by the Minister from time to time. In addition, under s 14, the Finance Minister only has involvement in certain types of investments — but not loans.

[1311]Evidence thus clearly shows that PW45 and PW38 thought it was important for them to share with the investment panel what the position of the accused was on the requests by SRC to KWAP in respect of each of the RM2 billion financing. It is true that the accused had no authority to approve the loans. Nor could either of PW45 or PW38 individually. Hence, the investment panel.

[1312]In my view, if it was not the case of PW45 and PW38 obeying the instructions of the Prime Minister and Finance Minister, it is manifest that they considered the influence of the accused to be sufficiently predominant so as to ensure that the investment panel was also apprised of the stance of the accused on the same.

[1313]And as I have found earlier, that was not all. It bears emphasis that even though the investment panel meeting on 20 March 2012 which approved the paper on the second financing (P387) had imposed a condition that the

drawdown be released in tranches, instead of a one lump sum release to the SRC, this was for all intents and purposes reversed pursuant to a meeting involving the accused, the Secretary General of the Treasury (PW45), the CEO of KWAP (PW38) and a deputy Secretary General of the Treasury (DW3). This meeting was referred to in an email from Nik Faisal to PW38 in P388, copied to PW29, the assistant vice president in the fixed income department in KWAP.

[1314]PW29 testified that he was informed that in a meeting with the accused, and attended by KWAP CEO (PW38), Tan Sri Wan Abdul Aziz (PW45) and Dato' Mohd Irwan Siregar Abdullah (then a deputy Secretary General of the Treasury) (DW3), it had been decided that SRC ought to be provided with the financing in accordance with the conditions for the first financing. PW29 referred to an email that was addressed to PW38 (P388),to which he was copied, where Nik Faisal stated that:

> I just received a call from YAB Prime Minister and Minister of Finance informing me of the following decisions made resulting from YAB's meeting with YBhg Tan Sri KSP, YBhg Datuk TKSP Irwan, and YBhg Datuk on Thursday, 22 March 2012:
>
> 1. That SRC International Sdn Bhd ('SRC') is to execute agreements with KWAP for the 2nd RM2b Government Guaranteed Loan with exactly the same loan agreements, i.e.:
>
> - Bullet draw-down of RM2b upon signing of agreement
> - Interest rate is exactly the same terms as per previous agreement
> - Repayment is exactly the same terms as per previous agreement
> - Usage of funds is exactly the same terms as per previous agreement
> - All other terms as per previous agreement

[1315]This therefore resulted in yet another paper, circular paper No 7/2012 March 2012 (P389) to the investment panel for the approval that the drawdown be effected in one lump sum of RM2 billion. Again, it is observed that the reason stated in that circular paper for the change in the manner of drawdown is attributed to the update by SRC post the investment panel approval on 20 March 2012 that at the meeting at the Prime Minister's Office (PMO) it was agreed among others that the second financing should be based on the terms of the first. As such, just like the main approvals for the first and second financings, the investment panel, as the approving authority, was formally informed in the paper submitted to the investment panel of the involvement of the accused at the PMO meeting, which required the reversal.

[1316]This was approved by the investment panel. However probably since the investment panel only just had its meeting on 20 March 2012 the paper was submitted by way of circularisation to the members all of whom (apart from one who was overseas), responded by sending their respective approvals back on the same day on 23 March 2012 apart from one on 25 March 2012, and with one out of the six members who responded to sign off their approval provided comments that SRC should provide its progress report on its investments, and use of funds from the financing and submit its audited accounts annually.

[1317]Yet again, the involvement of the accused is made plain. Even on a matter considering the terms of the disbursement of the additional RM2 billion. Consistent with the overall approach of rushing all related approval process, at KWAP as well as MOF, similarly here the concerns seems more for the entire additional RM2m be quickly disbursed to SRC.

[1318]The reason for the investment panel deciding on the progressive payments approach was to ensure the existence of viable investment opportunities to justify release of the funds, and for KWAP to be able to better monitor the use of the financing proceeds by SRC. This is of course a pretty standard term in the lending business. The minutes of the meeting on 20 March 2012 (P476) states the following:

> The Investment Panel deliberated on the terms and conditions of the proposed additional facility and requested that the facility be disbursed on scheduled draw down basis instead of one lump sum for KWAP to have better control over the utilisation of the loan.

[1319]Incidentally the investment panel was also concerned about the size of the financing. In the same minutes, the following is recorded:

> The Investment Panel also agreed for KWAP to review the loan limit for government guarantee to avoid over-concentration risk to any of the loans granted to the borrower.

[1320]The rationale for the single release decided at the meeting at PMO after the decision of the investment panel appears to be purely on the basis that the earlier terms ought to be followed. This is at best tenuous, especially since the investment panel might have had different concerns after evaluating the development and progress of the use of the first RM2 billion.

[1321]This circular paper No 7/2012 March 2012 (P389) to the investment panel for the approval that the drawdown be effected in one lump sum of RM2 billion did state that to provide comfort to the investment panel, two matters had been decided on but 'shall not be imposed as conditions' to the additional

facility. These are the appointment of a Deputy Secretary General of the Treasury (PW44) to the board of directors of SRC. This never materialised. Secondly, SRC was to disclose some of the investment opportunities which were at the advanced stages of negotiations. This was provided in the said circular paper.

[1322]It should also be emphasised that even in this circular paper which now recommended a single release of the additional RM2 billion following the meeting at the PMO, it is stated that the review by KWAP was not able to verify and ascertain the reliability and accuracy of the information provided by SRC on the said potential investments. This suggests an unusually strong risk appetite on the part of the investment panel but the paper did state that KWAP can ultimately take comfort in the government guarantee.

[1323]The defence also highlighted that the meeting at the PMO was nothing sinister and it was merely for PW38 and PW45 wanting to meet the accused to keep him abreast of the situation vis a vis the second financing to SRC as they did during the application for the first loan, and that it was not a meeting called by the accused. This I think may be true but at the same time reinforces the argument on the influence of the accused to the extent that PW38 and PW45 felt compelled to have that meeting to update the accused on the matter. At the same time, the defence cannot conveniently ignore the fact that this meeting at the PMO on 22 March 2012 was subsequent to the approval already granted by the investment panel on the additional RM2 billion which in its deliberation at its meeting on 20 March 2012 had already imposed a condition that a progressive disbursement be effected, instead of a one lump sum release to the SRC.

[1324]There is another curious point about this meeting at the PMO two days after the decision of the investment panel approving the additional RM2 billion. It is this. The meeting is stated in that email from Nik Faisal to PW38 (P388) to be attended by the accused (the inference must be that he chaired the meeting), PW45 (the chairman of the board and the investment panel of KWAP), PW38 (the CEO of KWAP) and DW3. Who raised the issue of the need to follow the terms of the financing of the first RM2 billion by KWAP? It could not have been PW45 or PW38, both of whom participated in the meeting of the investment panel which had imposed the condition on the progressive release of the RM2 billion. DW3 had no involvement in the processes of the investment panel at KWAP. Given the circumstances I would even infer that it was Nik Faisal who had earlier updated the accused on the decision of the investment panel and to request the Prime Minister to raise the issue about the need to follow the terms of the previous financing at the meeting. This is supported by the fact that it was Nik Faisal who updated

KWAP about what transpired at the meeting at PMO, as evidenced in the email (P388) from Nik Faisal to PW38 as referred to earlier.

[1325]Why did the investment panel put this condition on progressive drawdown of the RM2 billion? It is obvious from the proposal paper and the minutes of that meeting on the 20 March 2012 that the investment panel had valid concerns, as recorded in the minutes of that meeting. As follows:

> (i) The Investment Panel was of the view that size of the loan of RM2.0 billion is relatively huge as compared to SRC International's paid-up capital of RM2.00. Hence, the Investment Panel is willing to consider to provide RM1.0 billion financing as per the original proposal as deliberated during the previous Investment Panel Meeting held on 5 July 2011;
>
> (ii) The Investment Panel is willing to consider the request if the loan is granted to 1MDB instead of SRC International due to the fact that 1MDB is a wholly-owned subsidiary of the Ministry of Finance Incorporated ('MOF Inc') where the financial management, discipline and strong governance will be guided and controlled by the MOF Inc;
>
> (iii) The Investment Panel was also concerned on risks associated with the investment particularly on repayment risk, overconcentration risk, country risk and industry risk;
>
> (iv) The Investment Panel also required on the capabilities of the management of SRC International as an experienced and skillful management team needs to be assembled to undertake investments in energy resources which requires a high level of expertise and specialization;
>
> (v) As the financing is intended for investing in natural resources assets, the Investment Panel was of the view that the financing should not be disbursed in one lump sum but to be structured based on progressive disbursement backed by documentary evidence; and
>
> (vi) The Investment Panel was of the view that the Facility is best structured on a staggered basis with a set limit on each specific investment to ensure diversification of portfolio and to avoid concentration risk.
>
> After due deliberation, in view to support the GoM's strategic initiative while working towards addressing all the above concerns and issues, the Investment Panel approved the proposed financing of up to RM2.0 billion be granted on via either of the following options:
>
> (i) Kwap to provide the financing to 1MDB with a guarantee from the GoM; and
>
> (ii) Kwap to provide the financing to the GoM, where the GoM is the obligor. The GoM would then provide the financing to 1MDB.

[1326]It cannot be emphasised enough that the decision of the investment panel, the authority that the accused himself testified to be the one legally

empowered to consider loans applications to KWAP (and not him) could even be reversed on a condition of approval lawfully imposed by the investment panel. And this reversal was clearly attributed to the authority and influence of the accused. No doubt the legal process was followed to give effect to the reversal. Another paper had to be submitted by the fixed income department of KWAP to the members of the investment panel who now agreed to follow the previous terms and conditions, despite their decision earlier on 20 March 2012 approving the RM2 billion financing that the drawdown be effected progressively, in tranches.

[1327]Does this not provide clear confirmation that the pertinent decisions and requests of the accused, despite not being legally binding were for all intents and purposes meant to be obeyed? The accused noted his agreement on the SRC letter (P364). This resulted in the request being considered by KWAP. He told PW45 that RM2 billion would suffice, a request also then made known to the investment panel. Indeed the approval was granted by investment panel for RM2 billion. He issued the shareholder minute which stated his approval for SRC to seek an additional RM2 billion from KWAP, which was stated in the relevant proposal paper to the investment panel. And again approval was obtained for RM2 billion. In that approval the investment panel thought that the draw down to SRC should be made progressively on account of the investments to be made by SRC. But the meeting at the PMO involving the accused on 22 March 2012 decided that the same terms and conditions for the first financing should be made to apply. And the investment panel subsequently formalised an amendment to its approval in respect of the terms and conditions of the second financing.

[1328]As such the argument that the accused were merely making requests and that the processes must still be followed fails.

Whether the accused's agreement for KWAP loan constituted approval

[1329]The accused maintained his stand throughout cross-examination that he never instructed KWAP to approve the loans to SRC despite his notation on P364 to the CEO of KWAP agreeing to the request of SRC for the loans. He was merely stating his stand, an expression of agreement which was not the ultimate decision for the law vests the authority to approve the loan in the investment panel. The accused explained that he could not help it if others construed his notation as an instruction and stated that such a view is without basis since the law does not give him the authority to approve the loans.

[1330]This is not untrue. But it again misses the point. The allegation against the accused in this context is not that he approved the loans. He clearly did not. The investment panel did. The complaint against him is that he had wrongfully

undertaken a course of conduct which influenced those who were vested with the authority to approve the loan and the government guarantee, to approve the same.

[1331]The relevant KWAP documentation (email, proposal papers to the Investment Panel and minutes of the meetings of the investment panel) made reference to the notation to the CEO of KWAP on that SRC letter (P364) as the accused as the Prime Minister and Finance Minister having agreed to the request by SRC in respect of the first RM2 billion loan and the MOF Inc shareholder minute executed by the accused as the Finance Minister having agreed to the second RM2 billion loan. That was how KWAP construed and understood the nature and effect of the involvement of the accused as discussed earlier. More so when in other communication, the accused was equally able to be more specific on whether he agreed or he had asked for the matter be evaluated further. And this reaction on the part of KWAP is, for lack of a better description, unsurprising because the accused was the Prime Minister and Finance Minister of the country, with the sheer weight of his office, and with both MOF and KWAP being ministries and institutions directly under his portfolio. It is incredible if the accused could not appreciate that fact.

[1332]After all the SRC letter (P364) where the accused stated to KWAP CEO his agreement with the proposal from SRC also contained the statement that 'SRC will operate under the advice of YAB Prime Minister ...'. On this the accused advanced another line of defence on his role vis a vis the directors of SRC, stating that he would only render advice or deal with SRC matters if his advice was sought by SRC in the first place. That, evidence will show is also further from the truth.

[1333]Counsel for the accused then highlighted to the accused that in reference to four different letters which the accused had put his notation, he wrote 'bersetuju' (agreed) on three of them — P364 (letter to KWAP), P557 (letter from SRC 9 January 2012) and P357 (memo from EPU dated 12 October 2010), but stated 'untuk kaji dan ulasan' (to be evaluated and commented on) on P356 (the letter from SRC which the accused notated for the EPU). When asked to explain the contrasts, the accused answered that the setting up of SRC would clearly be predicated on the support of EPU such that it was, in his words, 'not right to pre-determine the outcome'.

[1334]I fail to see how this testimony of the accused could help his defence. In the first place the fact that the accused could deliberately minute his agreement on some letters but state differently on others manifests the point that his minute 'setuju' was not a standard and directionless expression devoid of the accused's own thought process. In the second place, his specific answer too

reveals that on other occasions (such as other than the matter requiring input from EPU) it would be proper to determine the outcome upfront.

[1335]Tellingly when questioned whether the accused agreed that by contacting PW45 (the KWAP chairman and Secretary General of MOF) the accused as the Prime Minister and Finance Minister then had applied subtle pressure on him, he replied that it was not intended as the law was clear that only the investment panel could approve. This, in my view, is a tacit admission that undue pressure was applied on PW45 who was in fact the chairman of the investment panel.

[1336]When re-examined as to the prosecution's suggestion that because of his interest in SRC, the accused had exerted influence in many aspects of the process related to the approval of the government guarantees, it is noteworthy that whilst denying, the accused also stated, not once but twice that he never instructed anyone 'specifically'. He repeated a similar answer when asked again about the letter from SRC (P557) to the accused as the PM seeking the confirmation of the latter on several items, stating that his notation of agreement on that letter was not meant as a 'specific' instruction.

Whether advice was only given when soughtby the board of SRC

[1337]In his cross-examination, the accused was very insistent that it was for the directors of SRC to address issues faced by the company. The accused said his involvement was only when requested by the board of SRC. But when confronted by the learned attorney general with the fact that seven documents which in chronological fashion are — the letter to EPU of 24 August 2010 (P356), the M&A of SRC dated 4 January 2011 (P15), that crucial letter from Nik Faisal to the accused dated 3 June 2011 on its request for loan from KWAP which bears the notation by the accused (P364), the email dated 29 June 2011 from the AVP of KWAP who prepared the proposal paper (P366), the email dated 1 July 2011 from Nik Faisal (P368), the first proposal paper to the investment panel recommending a RM1 billion loan to SRC which was incorrectly dated 'July 2010' (P372), and the subsequent proposal paper to the investment panel recommending the RM2 billion loan to SRC which was also incorrectly dated 'July 2010' (P372) — which were all crucial to the approval process for the first RM2 billion loan — were dated prior to the formation of the board of directors of SRC which begs the obvious question how could the accused have given any 'advice' on the loans like he did if the board was not even constituted then. The accused disagreed with this assertion and stated that he had dealt with the CEO of 1MDB at the material time.

[1338]There is however a certain inaccuracy in the contention of the prosecution. This is because once a company is incorporated its board of

directors is also constituted. So to say that there was no board of directors when the accused issued that notation to the CEO of KWAP in P364 is not right. As mentioned earlier, the first two directors of SRC included Nik Faisal, with whom the accused interacted in respect of P364. Nevertheless, I accept the essence of the argument of the prosecution that the members of the board of directors chaired by PW39 who were tasked with managing the business and affairs of SRC to meet the national strategic resources agenda were only appointed subsequent to the events surrounding the aforesaid seven documents.

Whether the approval of the first RM2m loan was due to a revised application by SRC

[1339]The submission of the defence is that the preliminary decision of the KWAP investment panel that first approved a loan of RM1 billion changed to RM2 billion because of a revised application made by SRC which was prior to the conversation that the accused had with PW45 where the accused said RM2 billion was sufficient. This issue was not raised previously.

[1340]The defence however referred to the following part of the testimony of PW38 during cross-examination, as recorded in the notes of proceedings on 29 May 2019 — PW38:

> S: In your witness statement, you said just before the 19th July 2011 meeting, Tan Sri Chairman, Datuk Dr Wan. I don't know why I keep saying Tan Sri Chairman, Datuk Dr Wan Aziz, he informed you of the communication that he had with the Prime Minister regarding the communication that expedite the loan process and RM2billion is sufficient, memadai atau mencukupi?
>
> J: Correct.
>
> S: That was only told to you by Tan Sri Wan just before the meeting commenced on the 19th of July?
>
> J: Correct.
>
> S: If I then take you to P372, page 2, paragraph 2.1(iii), at the time this paper itself was drafted, approved by fixed income department and yourself as CEO signifying the investment committee's approval, this paragraph was already there, correct? It goes without saying, correct?
>
> J: Correct.

[1341]In fact the prosecution argued that there is no evidence before this court to show as to when the said purported revised application was submitted by SRC to KWAP. I therefore agree that to conclude that the investment panel had in fact approved of the financing pursuant to the merits of a revised application would be erroneous.

[1342]Indeed, I reiterate that instead, what is manifestly before this court however is the fact that it was highlighted in the minutes of the investment panel meeting on 19 July 2011 (P417), at para 2.1 therein that:

> The investment panel noted that SRC International's request for the financing up to RM1 billion has been tabled during the previous panel meeting on 5 July 2011. The approval has been deferred pending KWAP's receipt of further information of SRC International's model and investment plan.
>
> The Chief Executive Officer ('CEO') reported that the Prime Minister has communicated to the Chairman of KWAP to expedite the financing and that a facility of RM2.0 billion would suffice.

[1343]Thus the very conversation the accused had with PW45 urging the latter to expedite the financing and that RM2 billion would suffice was recorded in the minutes of the meeting of the investment panel. Furthermore, the minutes stated that the approval had been deferred pending KWAP's receipt of further information of SRC's services model and investment plan which would mean that any revised application would only meet the requirement of KWAP if it contained satisfactory particulars of SRC's services model and investment plan.

[1344]Clearly, the alleged revised application if it existed, lacked merit for the immediate approval of the KWAP investment panel. And the outcome of the meeting in question was that a financing of RM2 billion was approved by the investment panel. This financing amount was exactly what the accused had told PW45. And the other 'request' of the accused as expressed to PW45, that to expedite, was apparent even from day 1 when the SRC letter was received by KWAP. The circumstances of the approval process were described by PW29 as to be done with such haste when he explained to the court why numerous documents were wrongly dated.

[1345]This court is mindful not to accept the proposition that all instructions issued by superiors to subordinates are inviolable directions which must be followed to a T, especially where the subordinates in question are highly qualified and accomplished individuals in their own respective areas of responsibility. But the facts and circumstances in the instant case are such that the undue influence of the accused in the process is demonstrably incontrovertible, and no less evident in the outcome of the process.

Whether the MOF had first evaluated SRC in the MGS option before the government guarantee

[1346]Although this has been advanced at the end of the prosecution case, the defence again raises this argument that the subscription of Malaysian

Government Securities ('MGS') (which was subsequently aborted) had already gone through the necessary evaluation and studies, and that this would explain why PW41 and PW43 were told to expedite the process, because they were actually unaware of the work already done on SRC in respect of the MGS subscription.

[1347]However, evidence shows that should any study be done on MGS, it would have been performed by the officers of Bahagian Pengurusan, Pinjaman, Pasaran Kewangan dan Aktuari ('BPKA'). At the material time PW41 was in fact the *Ketua Penolong Setiausaha* of BPKA and that PW43 was the *Setiausaha Bahagian* (who is the top civil servant in that division) of the same BPKA. Both denied having any knowledge about the alleged MGS.

[1348]In the notes of proceedings dated 19 June 2019 — PW41, the following answers by PW41 when cross-examined are pertinent:

> S: Selain itu terdapat juga kaedah pengeluaran Malaysian Government Securities untuk, sebagai cagaran pinjaman tersebut diberikan, ya Puan?
>
> J: Saya tidak pernah tahu hal ini.
>
> S: Puan tak pernah tahu hal ini. Setuju berdasarkan kepada surat ini Puan, apa yang dinyatakan di surat ini, pada (iv), MGS yang dinyatakan tidak menjadi, betul Puan?
>
> J: Saya tak tahu maklumat ini. Saya tak tahu.
>
> ...
>
> S: Saya cadangkan macam ini lah Puan ya, cara-cara pemberian jaminan kepada SRC International sebanyak RM2 billion ini, Puan tidak mengetahui apakah perkara-perkara yang diambil kira untuk dijadikan sebagai cagaran bagi jaminan tersebut?
>
> J: Tidak. Cagaran bagi pinjaman adalah jaminan.

[1349]And as for her superior, PW43, in the notes of proceedings dated 9 July 2019 — PW43, the following answers by PW43 when cross-examined on the MGS make the position crystal clear:

> S: ... Jadi Dato' mengatakan bahawa MGS ini adalah di bawah seliaan bahagian Dato?
>
> J: Ya.
>
> S: Jadi dalam minit mesyuarat ini nampaknya apa yang berlaku adalah KWAP telah memberikan dua option dan option MGS dipilih oleh pihak MOF?
>
> J: Saya tidak mempunyai pengetahuan.
>
> S: Tidak mempunyai pengetahuan secara berkenaan dengan apa yang berlaku?

J: Ya, tidak mempunyai pengetahuan apa yang dibincangkan dalam panel pelaburan.

S: Setuju dengan saya bahawa dalam mempertimbangkan kedua-dua option ini pihak MOF akan membuat kajian terhadap option yang telah diberikan dan akan memlih option yang terbaik untuk Kerajaan betul?

J: Saya tidak pasti.

S: Tetapi dinyatakan di sini bahawa pihak MOF telah memilih option B iaitu pengeluaran MGS?

J: Saya tidak mengetahui cadangan ini.

S: Dato' tidak mengetahui?

J: Tidak mengetahui.

S: Tetapi jika perkara ini benar, bahagian manakah atau pegawai manakah yang akan bertanggungjawab untuk melihat kepada kedua-dua option ini dalam?

J: Bahagian saya, bahagian BPKA.

S: Bahagian BPKA?

J: Ya.

S: Tetapi Dato' tidak terlibat?

J: Saya tidak mengetahui cadangan ini. Dan saya juga terlibat dalam penerbitan MGS.

S: Yes?

J: Ya, terlibat.

S: Tapi nampaknya bahawa perkara-perkara yang dinyatakan di sini adalah di bawah pengetahuan Tan Sri KSP dan juga Dato' Norzira Bahari?

J: Betul.

S: Mereka tidak membincangkan perkara ini dengan Dato' sebelum mesyuarat 12hb 8?

J: Tidak.

S: Dato', mengikut kepada jalan kerja di MOF berdasarkan kepada pengetahuan Dato' apabila MOF perlu memilih antara dua pilihan seperti yang dinyatakan di sini, satu kajian akan dijalankan untuk memilih sama ada untuk mengambil option A atau option B. Betul?

J: Betul jika ada cadangan.

S: Jika ada cadangan. Nampaknya berdasarkan kepada minit mesyuarat ini MOF telah memilih option B dan saya katakan bahawa kajian sepatutnya telah dijalankan kepada kedua-dua option, maksudnya kajian telah dijalankan sama ada untuk memberikan Governmnet Guarantee ataupun MGS, dan selepas kajian dijalankan baru option B dipilih? Secara logiknya?

J: Logik begitu tetapi apa yang setakat yang saya ketahui tidak ada option lain melainkan SRC meminjam daripada KWAP.

[1350]PW43, the head of the division in MOF which is responsible for MGS subscription firmly denied knowledge of the existence of any option of securing the financing to SRC via MGS subscription. Like PW41, PW43, the head of the division responsible for MGS in the MOF, emphasised that that there was no other option but the government guarantee.

[1351]The thrust of the argument of the defence is that in light of the alleged MGS subscription, it would have been unnecessary to make SRC and MOF go through the entire rigmarole again, and that PW41 and PW43 were wrong to complain they were rushed to prepare the Cabinet papers in question. In fact it was submitted that the government guarantee was not rushed, because when SRC tried to secure an MGS, the necessary feasibility study was already conducted at that stage, and therefore there was no need to conduct another feasibility study in preparation for granting the government guarantee. As recorded in the notes of proceedings dated 7 January 2020 — DW1:

S: I am putting it to you sir and I'll come to the reasons, I'm putting it to you that the Cabinet paper, MJM, was rushed with no adequate information contrary to what you say. You agree or disagree?

J: I disagree.

S: The prior issuance and aborting of the MGS made no difference to the rushed preparation of the MJM. You agree or disagree?

J: Disagree.

S: I am putting it to you sir that the preparation of MJM had nothing to do with the issuance of MGS?

J: I disagree.

S: And I'm putting it you MJM was indeed rushed as testified by PW41, Afidah. You agree or disagree?

J: On the basis that there was enough information. Sometimes Cabinet papers are prepared in a short period of time.

S: No, I'm saying that it was rushed.

J: Shorter than normal Cabinet papers, but it's not unprecedented.

S: Okay, I am stating to you that Afidah has said in her testimony that she had no time to verify the document and the background information of SRC, number one. Are you aware of that?

J: No.

S: Because she prepared, so she is saying that.

J: I disagree with that, there should be enough information because of the earlier MGS.

[1352]However, as is clear from his testimony, the accused himself did not have any knowledge as to whether if any MGS papers, which would contain studies that ought to have been conducted were passed to the officers preparing the Cabinet papers:

S: Are you aware if the MGS papers were given to the people who were preparing the MJM?

J: No, because, no, I'm not aware.

[1353]The manner matters were rushed at the MOF which led to the approval of the government guarantees is also consistent with the testimony of the defence's own witness, the former Secretary General of the MOF (DW3) (who succeeded PW45) who said that the approval process for a government guarantee would ordinarily take one to three months. Secondly, DW3 also confirmed that the division that handles MGS is where PW41 and PW43 were attached at during the material period. Both PW41 and PW43, as I have just stated, had given evidence that they were unaware of any MGS to secure any financing to SRC. The notes of proceedings dated 5 February 2020 — DW3, include:

S: Tan Sri, which department in MOF, moving on from Government Guarantee, security in general, which department in MOF oversees the issuance of Malaysian Government Securities?

J: Again, this is the division called BPKA, you know, Bahagian Kewangan dan Pasaran Pinjaman and Aktuari.

[1354]The defence is correct in stating that the fact is MGS had been subscribed as documented in investment panel circular paper No 19/2011 (P374) which stated in para 2.1:

(iii) Ministry of Finance (MoF) had agreed for option (b) above where the financing will be provided to the GoM via KWAP's subscription to an additional placement of Malaysian Government Securities(MGS) of which the proceeds would then be channelled by MoF to 1MDB.

(iv) We had on 29 July 2011 subscribed to an additional RM1.0 billion of MGS' private placement for this purpose. However, the MoF is not able to proceed with the transaction.

[1355]The defence then referred to the testimony of PW45 which suggests that the discussion on MGS at the Finance Division would not have reached BPKA. This thus explains the absence of knowledge on the MGS on the parts of PW41 and PW43. More importantly the defence submitted that PW45 had

A been satisfied of the merits of SRC's request then considered MGS but that failing MGS, resorted to the government guarantee instead.

[1356]When evidence is viewed in its totality, I cannot agree with this submission. First, PW45 himself confirmed that matters relating to MGS would come under the supervision of PW43 who led BPKA, and that PW45 had no knowledge as to the MGS that was subscribed by KWAP prior to SRC applying for the government guarantee. The notes of proceedings dated 10 July 2019 — PW45, include the following:

C S: Now the government guarantee and the MGS, a little bit to this option, would fall under the purview of Datuk Haji Maliami department which is the BPKA?

J: Yes.

D S: Now the events which are a little bit to in this approval paper suggest that an option was resorted to, but unfortunately it did not go through, so presupposes a feasibility study being conducted. Now does Tan Sri has any knowledge as to who n Treasury had done this study?

J: It could be Maliami side.

E S: Okay, but the problem is Haji Maliami came to Court yesterday and said that he did not know about this?

J: When it comes to financing, it is under his purview.

F S: It would be under his purview. Okay. Now it is represented here that on the 29th July, KWAP had agreed to subscribe to the MGS private placement, but it was not able to proceed with the transaction. Wearing your KSP hat now, Tan Sri, are you specifically aware of this taking place at Treasury side?

J: No.

G S: No?

J: I am not aware.

[1357]This submission by the defence on the MGS tries to show that MOF had, when dealing with the MGS option already conducted a study on the H merits of the request by SRC for a security for its financing request to KWAP. Thus when the MGS route could not proceed, the rush to approve the government guarantee is not unjustified because the study on the request by SRC had already been undertaken.

I **[1358]**The fallacy of this submission is threefold. First, it is clear that the subscription of the MGS is not clearly confirmed by any of PW41, PW43 or PW45, despite the matter being under the purview of BPKA in the MOF. In fact the investment panel circular paper No 19/2011 (P374) is not a MOF document. It is plainly KWAP's.

[1359]Secondly, and more importantly the key issue relied on by the defence is that a study had already been performed by the MOF for the purposes of the MGS (whether or not it was finally pursued). But there is absolutely no evidence to support this. No witness has testified that a feasibility study or evaluation of the SRC's request had been done. This was entirely an assumption made by the defence, on the basis that MGS could have been considered before the government guarantee option.

[1360]But where is the evidence that in considering an MGS subscription, MOF must have done the alleged evaluation and study? After all the MGS instrument involves very different features from a government guarantee. The latter necessarily needs to establish a strong repayment capability of the borrower to the lender, as any default would result in the call of the guarantee. But the MGS? Based on P374, the MGS was to be issued to KWAP.

[1361]This meant that KWAP would have to pay the MOF (the Government of Malaysia) for its subscription of RM1 billion of the MGS issued by the Government of Malaysia. It would be this proceeds of the subscription from KWAP to be received by MOF (on behalf of the Government of Malaysia) that would be used to extend a direct financing to 1MDB. In other words, the source of the financing is the proceeds from KWAP. Thus different considerations could have been relevant.

[1362]In the notes of proceedings dated 7 May 2019 — PW29, it was stated by PW29 the KWAP officer in the fixed income department who prepared the various approval papers as follows:

> S: Was it within your knowledge that there was actually a subscription for the MGS?
>
> J: Yes.
>
> S: That means the documents in term of applying for the MGS and the issuances of the MGS were actually signed out?
>
> J: Yes, but MGS there's no real documentation. It is just the matter of ordering.

[1363]This shows that at KWAP, the subscription was done, and it merely involved a straightforward process of ordering. But it does not at all even suggest that at the MOF, which issued the MGS to KWAP that a feasibility study had been done on the SRC's financing.

[1364]Thirdly, as the relevant investment panel paper (P374) stated, the option of MGS (assuming it was ever considered by MOF) was to allow MOF to utilise the funds to be raised from the subscription by KWAP of the MGS so that MOF could extend a financing not to SRC, but 1MDB. A feasibility study

(if any) on the SRC's request, a new company with no track record as a borrower is not the same as a feasibility on 1MDB as a borrower.

[1365]As such this submission of the defence, with the benefit of the evidence of the accused and DW3, that there was no need for the MOF to embark on a time consuming feasibility study because the same had already been undertaken in preparation of an MGS subscription is very short on substance and devoid of merit when tested against all the evidence in this trial.

Whether the accused was not involved in the second government guarantee

[1366]The defence submited that the accused had delegated the matter to be evaluated by Tan Sri Nor Mohamed Yakcop ('Tan Sri Nor'), the Minister in the Prime Minister's Department in charge of EPU who had resolved to grant SRC a RM2 billion government guarantee. In addition, the defence also relied on Tan Sri Irwan (DW3)'s evidence whom the defence asserted had addressed his mind on the matter and had seen it fit to escalate the relevant papers sent to him (given the assumed absence of PW45) for Cabinet's approval. In other words, there was no evidence of any influence of the accused vis a vis this second government guarantee.

[1367]However, at all material times, the accused was the Prime Minister and Finance Minister. Both Tan Sri Nor and PW56 were then members of the Cabinet led by the accused. Evidence supports the submission that Tan Sri Nor was involved in the EPU's assessment of 1MDB's request for the grant for the setting up for SRC. He was the Minister in charge of EPU then.

[1368]But why a non-MOF Minister was tasked with the approval of the papers for the Cabinet on a plainly MOF matter which concerned a government guarantee is not explained. He was not called by the prosecution but his approval on the Cabinet MJM papers (P526) suggests that the accused wanted a Minister who was familiar with the proposals on SRC to lead the process at the Cabinet meeting. As for Second Finance Minister (PW56) who approved the MJM papers (P527) for the second guarantee to be escalated to the Cabinet, his evidence is that the matter had already been agreed to by the accused.

[1369]What is undeniable is that the Cabinet papers for the second government guarantee was once again prepared by PW41 without first going through the usual diligence and verification process vis a vis the information submitted by SRC and that it was yet again completed within the same day, just like how it unfolded in relation to the first government guarantee.

[1370]Next, in relation to what happened in KWAP, the accused took the position that he was unaware of SRC's application dated 13 March 2012 (P383) and its attachment, the relevant shareholder minute from MOF Inc (P385), and claimed to have only become aware of the application in a meeting between himself with PW38, PW45 and DW3 which happened two days after KWAP had granted its approval. And because there was no discussion involving the accused prior to the decision to grant the second loan to SRC, it could not be said that the accused had given any instructions or taken any action to cause KWAP to decide to grant the second financing to SRC.

[1371]It is true that there is no evidence of any discussion or conversation involving the accused *prior* to the approval of the second financing request by SRC to KWAP.

[1372]But the analysis at the end of the prosecution case clearly demonstrates, as mentioned earlier, that in the investment panel paper No 11/3/2012 (P387) which was tabled for the purpose of deliberating on the additional loan facility of RM2 billion sought by SRC, para 3.2 therein stated:

> 3.2 The Government had approved the Guarantee on 16 February 2012 while the Minister of Finance had subsequently approved and advised for the Additional Facility to be procured from KWAP as KWAP is the financier to the Original facility.

[1373]This statement was further captured in the minutes of the investment panel meeting (P476) at para 4.11 where it was stated that first, the Finance Minister had approved and advised for the additional RM2 billion to be procured from KWAP and secondly, Finance Minister requested that the additional facility be applied for at a comparable or reduced profit rate due to the change of ownership of SRC from 1MDB to MOF Inc. As such, this manifest expression of the accused's preference or request was conveyed to the investment panel in the proposal paper on the additional RM2 billion tabled to the Investment Panel for its consideration. This I repeat was *before* the approval was given by the investment panel.

[1374]The basis for that para 3.2 of the investment panel paper No 11/3/2012 (P387) was that the board of directors of SRC approved on 17 February 2012 that the company seek an additional RM2 billion financing in line with a shareholder minute of even date (P385 OR D535 and D534?) executed by none other than the accused himself, as the MOF Inc by then the sole shareholder of SRC. Both the board of directors' resolution and the shareholder minutes are collectively marked (P385). The shareholder minutes were also separately marked as P534 and P535.

[1375]The defence challenged the admissibility of the shareholder minute in

exh P385. This is addressed later, separately, in the section on the CBT charges concerning the admissibility of disputed documents.

[1376]Suffice at this stage that I reiterate that the accused never disputed the authenticity of his signature on the shareholder minute (P385) when his statements were first recorded by MACC. Neither did he raise the issue clearly in the cross-examination of the prosecution witnesses. The documents including P385 had been given much earlier by the prosecution in adherence to s 51A of the CPC but the defence statement by the accused under s 62 of the MACC Act too did not specify the defence's objection to that the shareholder minutes which bear his signatures as the MOF Inc.

[1377]The accused also abandoned its attempt to call his appointed expert on document examination after the expert had performed the examination in this court following my allowing the application by the defence. Nor was there any evidence of any complaints by the accused to KWAP or MOF or any other parties after the said resolution was acted on. In any event s 71 of the AMLATFPUAA and s 41A of the MACC Act permit P385 to be admitted in evidence, whilst on the weight, other available evidence amply demonstrates that the accused must have signed those shareholder minutes and other disputed documents.

[1378]It is incontrovertible that the accused was aware as early as 9 January 2012 of the SRC's letter addressed to him (P557) that SRC would be seeking a second government guarantee for an additional facility. And the accused had in fact approved this request by his own minute on the said letter. As such the accused's claim that he was not aware of SRC's application to KWAP dated 13 March 2012 is the opposite of the truth.

[1379]It will be recalled that as discussed earlier, according to PW45, the accused had telephoned him to ask that KWAP immediately release the second RM2 billion to SRC which was even before the formal guarantee document was furnished to KWAP. This then led to PW43 issuing the said letter, prepared by PW41, from MOF to KWAP dated 28 March 2012 (P397), requesting KWAP to release the RM2 billion loan to SRC prior to the receipt by KWAP of the government guarantee.

[1380]As I have stated earlier, PW29 of KWAP and PW45 as well as PW41 and PW43 of MOF testified that such a situation was unprecedented. PW43 gave evidence that this had never happened before because the guarantee had not been finalised by the Treasury Solicitor. PW43 admitted he issued the letter because he was directed to do so by the Secretary General of the Ministry of Finance (PW45) who had told him this was requested by the Prime Minister.

The RM2 billion was immediately credited into SRC's account on 28 March 2012, which was on the same day the MOF letter (P397) was dated and sent to KWAP.

[1381]Further, whilst PW45 agreed to the suggestion during cross-examination that there was nothing wrong for a Prime Minister to push hard to expedite the implementation of certain projects, SRC had nothing to show how the massive financing of RM4 billion from KWAP was utilised, for which he had no knowledge.

[1382]As I have stated earlier, in the analysis at the end of the prosecution case, from the perspective of the lender, in this case, KWAP, the drawdown of the entire financing of RM4 billion to the borrower even before the lender having in possession the formal evidence of the security document such as in the form of the government guarantee is not standard commercial lending practice considering the risk that the document might not be received for whatever reasons, notwithstanding that the MOF in that letter undertook to deliver the document within 10 working days. This is also the stance taken by KWAP's PW38 and PW29, as mentioned earlier.

[1383]It cannot thus be denied that the early drawdown of the financing by KWAP to SRC without waiting for the formal government guarantee to be delivered by the guarantor to the lender is unusual. This situation remains unprecedented from KWAP's perspective, the party whose views on this issue is the one that matters since KWAP relies on the government guarantee to justify its financing SRC.

[1384]The defence also raised the assertion that the practice of KWAP in any case suggests that the requirement for a written government guarantee is not a strict one as that had been waived for the first government guarantee as well as the second government guarantee. The defence said that for the first guarantee, no request had been made but the waiver was nevertheless given in what appears to be a standard practice of KWAP.

[1385]This however is a very sweeping statement unsupported by evidence. The waiver referred to is in the checklist prepared by the law firm who prepared the financing documentation (D492). None of the witnesses from KWAP referred to this purported waiver. In fact they all agreed that the early drawdown for the second guarantee was unusual and unprecedented. And there was never any issue of the waiver for the first guarantee. This argument is thus so clearly without merit.

[1386]As such, the submission of the defence that the accused was not involved in the process in respect of the additional facility of RM2 billion at

KWAP and the second government guarantee at the MOF is very far from accurate. In view of the aforesaid contemporaneous documentary evidence, the denial of the accused is nothing better that a bare denial.

Whether there was adherence to statutory requirements on the government guarantees

[1387]There are two aspects about the provision of the government guarantees that demonstrates less than full adherence to the applicable statutory requirements. The first is that s 6 of the Loans Guarantee (Bodies Corporate) Act 1965which requires the Finance Minister to consent to the provision of the second government guarantee whilst the guarantee liability in respect of the first loan was still subsisting, like the situation in the instant case.

[1388]Section 6 reads as follows:

> 6 Restriction on borrowing powers of body corporate so long as guarantee outstanding
>
> So long as the Government shall continue liable under any guarantee given under this Act in respect of any sums raised by a body corporate, the body corporate shall not except with the consent of the Minister exercise any other power to borrow possessed by it.

[1389]There is no evidence that the requisite consent by the accused as the Finance Minister for the granting of the second government guarantee, despite the prosecution repeatedly questioning the accused for the same. Instead, the accused maintained that the second guarantee had been approved by the Cabinet. This is true, but it does not strictly comply with the provision of s 6 of the Loans Guarantee (Bodies Corporate) Act 1965.

[1390]The second is the requirement of s 7 of the same Act, which provides as follows:

> 7 Powers exercisable by Government in event of prospect of default by body corporate
>
> (1) Where it is made to appear to the Yang di-Pertuan Agong that there is reasonable cause to believe —
>
> (a) that a body corporate is likely to fail or be unable to discharge any of its obligations under any agreement concluded by it under this Act or under any bond, promissory note or other instrument issued pursuant to any such agreement; and
>
> (b) that the Government is or may become liable under any guarantee given under this Act in respect of that obligation,

A

the Yang di-Pertuan Agong may by order give or authorize any other person to give such directions to the body corporate as he or that other person may from time to time think necessary or desirable to ensure that satisfactory arrangements are made by the body corporate to enable it duly to discharge its obligations under such agreement, bond, promissory note or instrument or under this Act.

B

(2) The body corporate shall notwithstanding any provisions contained in the written law by which it is established comply with any directions given by or under any such order.

C

[1391]This essentially permits the government, specifically through the exercise of the powers of the YDPA (the King) to give directions to the borrower whose loans is guaranteed by the government in the event of any default by the borrower. The accused agreed that SRC's first default was brought to the attention of the Cabinet which then agreed to the issuance of a short term loan. But the second and third situations were only dealt with at the level of the Finance Minister, being the accused.

D

[1392]This shows that the Cabinet (and the King) was not informed of the actual state of affairs confronted by SRC, despite the government having the statutory authority to give appropriate direction to companies like SRC when in situations of default, in the interest of the government. This was not fully adhered to by the accused as the Finance Minister, a conduct which is consistent with his apparent lack of interest in dealing with SRC matters after the RM4 billion loan was disbursed to SRC by KWAP in early 2012.

E

F

[1393]There is in fact another applicable statutory requirement in the said Act which compliance the accused failed to demonstrate. This is s 2(3) which reads thus:

G

Power to guarantee loans

(3) Subject to subsection (4) the Minister shall, as soon as possible after a guarantee under this section is given, lay before the Dewan Rakyat a statement of the guarantee together with a copy of the agreement aforesaid.

H

[1394]Whilst the accused insisted that this would usually be followed up by the administrative staff of the MOF with Parliament, no evidence could be shown that even if this was a mere formality, it had been adhered to.

I

Whether adverse inference should be drawn for the non-calling of Tan Sri Nor Mohamed Yakcop as a prosecution witness

[1395]I should add that the argument repeated by the defence that the non-calling of Tan Sri Nor by the prosecution justified the drawing of an

adverse inference under s 114(g) of the Evidence Act 1950 against the prosecution is alsowithout merit.

[1396]For it is trite that the prosecution is only under the duty to call witnesses who are essential to the unfolding of the narrative of the prosecution case (see the Supreme Court decision in *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433). Further, on the authority of cases such as the Court of Appeal decision in *Ng Tiam Kok & lain-lain lwn Pendakwa Raya* [2013] 1 MLJ 342 and the High Court decision in *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705; [2000] 4 CLJ 649, it is clear that in the event the prosecution has successfully proved a prima facie case, without calling some other witnesses who are available, an adverse inference cannot be drawn for failure to call a witness, and it is also not the responsibility of the prosecution to even offer the said witnesses.

[1397]No evidence was however withheld in the instant case, and the narrative of the prosecution unfolded without having to call Tan Sri Nor as a witness. The persons who prepared the documentation for the first government guarantee were PW41 and PW43 who testified on the same. Tan Sri Nor then presented the relevant MJM or Cabinet papers on the guarantee application by SRC at the Cabinet meeting on 17 August 2011 as specified in the charge, and as chaired by the accused as the Prime Minister. In any event, the prosecution did make available Tan Sri Nor available for the defence, which also enabled the defence to interview him.

[1398]As such, since the evidence of Tan Sri Nor is deemed not essential to the unfolding of the prosecution narrative, and given that he was also offered to the defence at the close of the prosecution case, there is no basis to find that the prosecution had suppressed any evidence to justify this Court drawing an adverse inference against the prosecution under s 114(g) of the Evidence Act 1950.

Whether the evidence of Tan Sri Dr Irwan (DW3) on government guarantee for new companies assists the defence

[1399]The accused agreed during cross-examination that the sole reason for the approvals by the investment panel was the existence of the government guarantees. He said that the investment panel had the choice of either rejecting the loan requests or approved them with government guarantees. And for this the accused was also instrumental in having the approvals by the Cabinet being rushed through, which the accused said was not unusual.

[1400]When cross-examined by the attorney general the accused agreed he facilitated the expeditious approval of the guarantees by the Cabinet, and

proffered the explanation that he was trying to help SRC secure important investment opportunities in natural resources. But to be clear, the accused denied that the entire set-up of the company was premeditated for him to benefit personally.

[1401]The accused stressed the point that the government guarantees were necessary because otherwise SRC, a MOF Inc entity with no track record, could not operate despite being designed to promote a national strategic initiative. This same national agenda argument was used by the accused who tried to offer an explanation as to why the formal request for the government guarantees on both occasions were made even before the applications for loans were sent to KWAP by SRC.

[1402]This narrative does not however appear to be entirely true when the testimony of the former Secretary General of MOF (who was a Deputy Secretary General at the material time) is considered. This was the evidence of Tan Sri Dr Mohd Irwan Siregar (DW3), the defence's own witness.

[1403]The defence sought to rely on the testimony of DW3, the former Secretary General of the Treasury who succeeded PW45. It is the submission of the defence that the evidence of DW3 that the principal consideration in granting the government guarantee to SRC was not its ability to repay the loan but rather that the services that SRC would provide was in line with national interest. In the notes of proceedings dated 5 February 2020 — DW3, it is recorded as follows:

> S: Now, what you just have said, the ability to pay back and such. This would of course favour companies with a track record, yes? Does it preclude however the provision of Government Guarantee to company newly formed?
>
> J: It depends. That's why I said, you know, its project based. Sometimes we look at the projects which they are going to implement. Whether in the future these projects are viable and they can generate that kind of revenue which can be able to service both the interest and the principal of that particular loan or bond. In terms of bond, we say coupon rate. Whether they can service the coupon rate and the principal.
>
> S: Now, Tan Sri, I was made to understand by Tan Sri Wan that in the context of projects catering towards the national interest, let's say for example development project for energy. The objectives and I suppose operations of the company is not for such a national interest objective, may not necessarily be profit based, yes? In such a circumstance, where the key of it is not to be profit based but to provide for a national interest area, would the considerations be different?
>
> J: Again, this is my opinion. You know. If it's a government project, of course national interest, government can borrow any amount. Government can issue you know bond because government is not a profit making entity. But any other than government entity, if they are coming to government, they must be able to service

A their borrowing. Unless Government ask them to implement something on their behalf, you know. Then it's a different question. But if they are going to be an entity on its own and implementing certain kind of projects, and asking for government guarantee, then they must be able to service their debt.

B **[1404]**The above exchange however does not fully capture the essence of the testimony of DW3 on the subject, which I will allude to shortly.

[1405]It is not in dispute that this third defence witness (DW3) — the former Treasury Secretary-General Tan Sri Dr Mohd Irwan Serigar Abdullah who C succeeded PW45 in 2013 was not involved in matters related to the proposal to grant government guarantees in respect of the financing by KWAP to SRC at the material time apart from signing a memorandum on the Cabinet papers on the second guarantee to the Finance Minister due to the unavailability of PW45. His evidence was based on his experience and knowledge given his long D service with the government — some 18 years at the EPU and 14 years at the MOF. There are four aspects about his evidence that are of significance, none of which however lends support to the case of the defence. The prosecution did not even cross-examine DW3.

E **[1406]**First, despite the interpretation placed by the defence on the evidence of DW3, he maintains that a company seeking a loan intended to be guaranteed by the government must be able to establish its ability to service interest and repay the loan. He insists that even a newly set up entity with no track record F must show a source of income able to service and repay the loan, and explains that a government guarantee cannot be simply granted just because it is undertaking a national interest project.

[1407]As such, even when the defence counsel cited two government owned G projects, namely the MOF Inc-owned concessionaire of the second Penang bridge Jambatan Kedua Bhd and the Bakun dam, DW3 explained that the former collects toll charges which can generate income and the latter — Bakun is a good project because it produces cheap electricity which can be sold at a slightly higher price. DW3 emphasised that government guarantees were given H for these projects because the projects could show that they could generate income. In the notes of proceedings dated 5 February 2020 — DW3, it is recorded as follows:

S: Sure. I stand corrected then. Thank you, Dato'. So, in 2011, 2012, or rather to the point, at the time during which you were in Treasury, you were serving in I Treasury. Yes. Can you just briefly outline the procedure when a Government Guarantee is applied for, and how this is treated and processed by the Treasury Department of MOF?

J: Usually like those who are coming for Government Guarantee, GG, they are usually Government owned companies. You know, I'll take for example during my

tenure there, Khazanah came, you know. They put up a proposal, they need to raise bond for their projects. So they submitted a request, so we analysed the request and we put it to the Minister of Finance, you know that Khazanah needs this thing. Any government guarantee after we have negotiated or discussed with the relevant application for this example Khazanah, we will put up a Cabinet paper because for any GG, you need a Cabinet approval. So we submit a Cabinet paper, once the Cabinet has approved, then the Minister will issue the Government Guarantee order, you know, to the relevant authority or entity.

...

S: No. Section 3 merely provides meaning of bodies corporate. So actually just stripping the legalies, what was the process, sir, for the Treasury to take this up all the way to Cabinet and eventually to obtain the approval?

J: Like I said, you know. I gave an example already that Khazanah. For example, in this case, I am taking Khazanah, you know. Khazanah will submit their request to Treasury and Treasury will evaluate and call Khazanah, discuss in detail, why do they need the bond, what are the purpose, the reason and everything and will incorporate this in the Cabinet paper and put our justification and we look at the ability to pay back. That is the important element, you know, to pay back the loan, when they take this you know, borrowing through bonds. Then we recommend whether to give or not to give this guarantee by government and table it to Cabinet.

Judge: So government will need to establish the ability to pay back first?

J: Yes.

Judge: Before agreeing to a guarantee?

J: Yes in cases, you know, we look at the background, the track record of the company, the performance of the company and everything. Of course in certain cases, you know, we look at the projects which they are going to invest. For example, Prasarana went to market to raise and for their railway and so on. So we looked at the railway project in the long run whether this project can sustain on itself to service the loan and the interest and so on.

...

S: No, wait. You gave evidence just now, sir, that one of the key consideration is an ability to pay back. Yes? And you said that the issuance of a government guarantee is not precluded for companies which are newly established. Yes?

J: I didn't say that. I didn't say newly established, but I said you know there are companies which can prove that they have projects in the future which will be implemented, can generate income which can service their coupon and the principal debt. So there is a difference you know.

S: Right, so I ask the question now sir. In the case of a newly established company, are they precluded from being a recipient of the Government Guarantee?

J: I never came across, but in this instance, let's say there is a company you know coming with a project which is already approved by government, a long term

project, energy projects or whatever projects which will give income, which can generate income, which can service the loan and also the principal, the government may consider.

S: So in other words, the requirement, there is no requirement that the company first have a proven track record, yes? Based on that reason.

J: Very very exceptional case, unless they have like I said you know, that projects already secured you know that and pretty sure will generate income.

[1408]The importance of this testimony to the case of the defence, in further weakening it, cannot be emphasised enough. This is because the accused had repeatedly stated in evidence that the government guarantees to SRC were justified because SRC was a government company undertaking a national and strategic initiative without a track record. He reasoned that if these green field ventures are not supported by the guarantees then they could never take off.

[1409]It is true as contended by the defence that DW3 never said that SRC did not qualify for either of the two government guarantees. He could not have since he was not involved in the approval process at MOF for the application by SRC. But DW3 did confirm the obvious that the repayment ability must be established and that could be demonstrated in the strength of the underlying project proposed to be undertaken. Moreover, unlike the examples given by the defence itself, namely projects generating toll charges and electricity, the projects claimed by SRC never promised any degree of certainty of income generation. In fact there is also doubt whether these investments mentioned by SRC could even in the first place be properly verified by KWAP and MOF when processing the respective applications where reliance was placed more on the representations made by SRC.

[1410]Secondly, as mentioned earlier, DW3 testified that the process involved in the application and approval of government guarantees, from the application to the granting of a guarantee, would in general take one to three months, depending on the urgency. He is not aware of any applications that were approved in less than a month, adding that it would take a month on average. In the case of SRC, the first guarantee was approved, by Cabinet, within one week.

[1411]This again contradicts the evidence of the accused who suggested that it is not unusual for the SRC application be expedited at the MOF for cases of national interest. He also merely denied giving any *specific* instruction for the matter to be rushed.

[1412]Thirdly on the process itself DW3 stated that typically, and using the example of a request once made by Khazanah Nasional Bhd which had sought

to raise bonds, after the sovereign fund submitted a request for guarantee, the same was analysed by the Treasury Department of the MOF which involved detailed discussions with the applicant and subsequently presented to the Finance Minister, before its tabling to the Cabinet for approval.

[1413]Thus, as is to be expected, detailed discussions would be necessary to progress the process. This did not however happen in the case of the application by SRC where the processing officer PW41 of the MOF said the information included on SRC and its investments could not be verified because of the rush.

[1414]Fourthly, in the Cabinet paper it was stated that comments from other agencies or ministries was unnecessary. The defence and the accused contended that this was because the MOF would have examined the financial implications of the granting of the guarantees. When asked generally about it, DW3 however said that inputs from other ministries which had looked into the underlying projects would be the usual procedure.

[1415]I understand this to mean that for the second bridge project, inputs could have been procured from the ministries of transport and works, and for the electricity generating dam, from ministries which oversee energy and works. In the case of SRC there was no input from any other ministries despite SRC being said by the accused as the vehicle spearheading the strategic national initiative to secure alternative energy sources other than oil and gas.

[1416]All the evidence given by DW3 was elicited in his examination-in-chief. They do not assist the defence of the accused. The prosecution chose not to cross-examine DW3.

Whether decision to bring SRC under MOF Inc supports the defence

[1417]The defence repeated the submission it had already advanced at the end of the prosecution case that the change of ownership of SRC being an MOF Inc company is a natural consequence of it being a subsidiary of 1MDB which was already an MOF Inc entity. The defence further submited that it is immaterial as to whether it was a top-down decision made by the accused or otherwise as the conduct of the accused was allegedly consistent with his performance of his public duty.

[1418]In my judgment, however, there is no basis for the defence to play down the significance of the testimony of PW44, the deputy Secretary General of the MOF who stated in unequivocal fashion that his action to execute the transfer process without the need for any further review was because the accused had already given his approval. I have to repeat that in the notes of proceedings dated 9 July 2019 — PW44, he says:

> Dalam kes ini, saya kategorikan sebagai top-down decision-making process di mana syarikat menghantar request terus kepada YAB Perdana Menteri dan Menteri Kewangan ...
>
> ... Bergantung kepada minit YAB PM, pertama YAB PM akan minit sila pertimbang sebaik mungkin atau sila kaji jika ini minit beliau maka saya akan gunakan pendekatan yang pertama tadi kita start daripada bawah balik sediakan paper dapatkan sokongan KSP dapatkan persetujuan KSP dan kemudian kepada Yang Amat Perdana Menteri apabila diluluskan barulah kita maklumkan kepada syarikat ... yang kedua adalah apabila YAB PM minit atas surat tersebut saya setuju dengan cadangan ini. So, kalau itulah minit YAB PM maka kita just execute the decision okay, tanpa ikut cara tadi ... PM telah memberi persetujuan. So kita just formalize the whole process.

[1419]And to put things in perspective, this testimony of Datuk Mat Noor Nawi (PW44), then a deputy Secretary General of MOF was made in reference to the letter from SRC to the Prime Minister dated 9 January 2012 (P557) where the minute by the accused thereon expressly stated 'bersetuju dengan cadangan ini' for SRC to be wholly owned by the government.

[1420]The defence also made the argument that PW44 concedes that this change is ultimately to the benefit of the government as it made SRC directly accountable to it and that the relevant Cabinet papers in MJM also noted that this allows the government easier access to monitor SRC's investments. The point therefore is that it is illogical to suggest that in order to facilitate a cover up, the accused exposed SRC to more scrutiny by a government body.

[1421]This contention of the defence belies the fact that by placing the ownership of the SRC directly under MOF Inc who was at the material time the accused himself, it gave direct ownership rights in SRC to the accused. It is true that 1MDB, which before the transfer was SRC's sole registered shareholder, was also directly owned by MOF Inc. But with the MOF Inc's direct ownership in SRC, the oversight in terms of 1MDB's shareholding role was removed.

[1422]One consequence would be that the accused could sign off on the shareholder minutes of the general meetings of SRC without the involvement of 1MDB. Thus all the shareholder minutes of SRC subsequent to P530 (which was a set of 1MDB shareholder minutes) bear the signature of the accused as MOF Inc, the sole shareholder of SRC. This change resulted in more power to the accused on SRC matters but in contrast did not result in greater monitoring by the relevant division in MOF, namely BMKD where evidence has shown (especially by PW53, another deputy Secretary General and PW56, the Second Finance Minister) that SRC saw if fit not to cooperate and comply with the requirements of BMKD.

Whether evidence of the accused refusing the Second Finance Minister's recovery efforts to visit Switzerland credible and assist the defence

[1423]The defence again sought to challenge the testimony of the former Second Finance Minister (PW56). The defence asserted that in his evidence the accused stated that he had never told PW56 to not get involved in 1MDB or SRC. The documentary evidence adduced in fact showed that PW56 was very much involved with the affairs of SRC. This included PW56 approving the MOF memorandum (D526), attending the Cabinet Meeting on 8 February 2012 and approving the MOF memorandum dated 4 November 2015 (D551) by which a short term loan of RM100m was given in 2015 to avoid KWAP from triggering an event of default on the SRC facility. The loan itself was to allow SRC to resolve the issue of the frozen funds in BSI Bank in Lugano, Switzerland.

[1424]Further, the accused testified that PW56's alleged request to go to Switzerland was merely something he raised informally to the accused as PW56 purported to know some officers in the Swiss Government. The accused had told him that there was no need to make the trip at that time as he understood that SRC was taking efforts to resolve the issue.

[1425]Nevertheless I observe that in his evidence, the accused had explained the reason he refused PW56's request to go to Switzerland to inquire about the decision of the Swiss authorities to freeze the monies belonging to SRC was that PW56 did not come to the accused with a proper and substantive proposal and that there would be matters to be considered, such as considerations on who would be the appropriate person to lead the delegation, to have the same tabled before the Cabinet for its approval, and that there was already a visit by the 1MDB Group and its auditors and the outcome of that visit was that they were satisfied with the findings.

[1426]It is observed that PW56's evidence that his request made to the accused for the former to visit Switzerland to attempt to have the funds of SRC returned to Malaysia had been refused by the latter is not denied by the accused. The accused however explained that he rejected the same because the request was not a formal one and PW56 never had a proper plan for the matter to be discussed by the Cabinet.

[1427]However, during cross-examination the accused agreed that despite what he said that PW56 did not have a proper plan, the accused did not suggest let alone direct that PW56 should prepare one, and neither did the accused himself formulate one, to pursue the recovery. In his insistence that the problem was for the board of directors to resolve, the accused even denied that an official delegation led by a government minister such as PW56 would have

A been more effective than leaving the matter to the board of directors of SRC to try address. This I find difficult to accept.

[1428]The accused also said that ultimately the matter would have to be dealt with in the context of a government to government discussion. But no evidence was presented in his defence to show that as Prime Minister until his resignation he had ever initiated any such discussion.

[1429]The defence also, based on the evidence of DW3, submited that PW56 had in fact chaired a special committee called the Budiman Committee which was set up with the specific purpose of overseeing SRC and 1MDB. Further PW44 had earlier confirmed that the Minister in charge of BMKD at the material time was both the accused and PW56. On top of this, PW56 in fact, according to the defence, admitted that he was never instructed by the accused to stay away from SRC, and in any event PW56 had an axe to grind against the accused.

[1430]The matter on the Budiman Committee was mentioned by Tan Sri Irwan (DW3). It was not mentioned by PW56 himself or raised by the accused in his testimony. Neither was this raised by the defence in the cross-examination of PW56 who was not confronted with any such evidence by the defence during his cross-examination. I accept that as a general rule the failure of the prosecution to cross-examine DW3 on this issue can be said to amount to the acceptance of that testimony (see *Public Prosecutor v Ee Boon Keat* [2006] 2 MLJ 633).

[1431]Regardless, the testimony of DW3 does not provide sufficient evidence about this Budiman Committee; such as why and when it was established, and what its findings in relation to SRC were. I must highlight that the accused himself, as the Finance Minister would have been able to throw some light about the Budiman Committee but he did not say anything.

[1432]More importantly, the failure to cross-examine must be seen in the context that the matter was not raised by the defence during the prosecution case, and especially not directed at PW56 by the defence. That this is an afterthought cannot therefore be dismissed, for it is incumbent upon the defence to cross-examine the prosecution witnesses to give them an opportunity to provide an explanation to the defence case.

[1433]Any failure by the defence to put the relevant question on the Budiman Committee is therefore an abandonment and the defence will be barred from raising this argument at the defence stage when it is impossible for the prosecution witness, PW56 to rebut the defence case on this point.

[1434]I need only refer to the decision of the Court of Appeal in the case of *Muhammad Faizal bin Dzulkifli v Public Prosecutor* [2017] 2 MLJ 228; [2017] 3 CLJ 424 where His Lordship Abang Iskandar JCA (now CJ (Sabah and Sarawak)) explains what amounts to an afterthought and a recent invention, as follows:

> [34] *So, an afterthought defence is a defence that smacks of a recent invention on the part of an accused person. It is a defence that was never revealed during investigation, nor confronted to the relevant prosecution witnesses during their cross-examination in the prosecution stage. Such being its nature, it is quite incapable, or difficulty of belief. Indeed, it arouses suspicion as to its veracity*. But, the fact that it is unbelievable does not relieve the prosecution of its attendant duty throughout the entire case, to prove its case beyond reasonable doubt. Neither does it automatically mean that the court must therefore convict the accused person, on account that the defence has been a mere afterthought. Rather, on authority of the case of *Mat v Public Prosecutor* [1963] 1 MLJ 263 it is still incumbent on the court to consider the entire evidence before it to see whether the accused person has raised a reasonable doubt in the prosecution's case. If such a lingering, as opposed to a fleeting or whimsical, doubt is created in the mind of the court, then the accused person is entitled, as a matter of law, to be acquitted and discharged forthwith, from the charge levied against him.
>
> [35] *We noted that the learned JC had taken a similar approach. He had, in considering the appellant's defence, looked at how the appellant had managed his defence version during the prosecution case. Having done so, he had noticed that the material factual circumstance which the appellant had advocated during the course of his defence was never put to the relevant witnesses for the prosecution*. We had adverted to that in the foregoing paragraphs of this judgment.
>
> [36] *In the circumstances, we found that it was not wrong for the learned JC to regard the appellant's defence as an afterthought defence. An overall perusal of the learned JC's treatment of the appellant's version of event, in the light of the entire evidence before him had shown to us that he had appreciated the defence version more than sufficiently*. We noted that he had not considered the defence version in isolation, or in a blinkered or myopic manner. By looking at the defence the way he did, namely in the context of the entire evidence before him, he was able to consider the probabilities of both parties' evidence as led before him. More important than that is the fact that he had done so correctly. *By doing that, he had scrutinised the entire evidence before him and subjected them to an objective and critical assessment. We were satisfied that he had not committed any error of an appealable nature, in the course of his appreciation of the appellant's defence. We found no merit in the appellant's complaint that the learned JC had erred when he allegedly failed to sufficiently appreciate and consider the appellant's defence*. (Emphasis added.)

[1435]I need hardly add the importance of the defence to reveal its defence at the earliest opportunity, what more this issue is pertinent to the charge under s 23 of the MACC Act where under s 62 of the same Act, the defence is obliged to disclose its case upon service of the documents by the prosecution under s 51A of the CPC. Such information is however not included in the defence statement.

[1436]The position of the prosecution that PW56 was kept away from SRC matters cannot therefore be refuted by the existence of this Budiman Committee whose function or very existence was not even put to PW56, for his explanation during the prosecution case. In any event, nor can the little testimony of DW3 on the Committee sufficiently rebut the evidence of PW56 in this regard.

Whether PW44 confirmed that the Minister in charge of BMKD is both the accused and PW56

[1437]The argument of the defence that PW44 testified that at the material time both the accused and PW56 were the Ministers responsible for BMKD is not disputed. That indeed was the arrangement. On this basis, however, the defence was trying to say that it is untrue that PW56 was prevented from getting involved in SRC, which belonged under BMKD. The point however is that, notwithstanding the arrangement at MOF, the testimony of PW56 has made it clear that his supervision of BMKD companies excluded 1MDB and SRC. The notes of proceedings dated 9 July 2019 — PW56 records as follows:

> S: Now, with regards to MKD, the oversight of MKD is not done by the Minister, it is done by the Bahagian MKD?
>
> J: Yes.
>
> S: The Bahagian MKD consists a number of people under MOF whose responsibility is to monitor and study and if necessary make recommendations to the Minister on MKD companies? Betul, Dato', so far?
>
> J: Yes.
>
> S: Dato' was in the MKD 2011, 2012. Can Dato' answer us? Who was the Minister who have oversight of the MKD Department in 2011 to 2012?
>
> J: Both MK2 and Minister of Finance.

[1438]This fact was not contested by the prosecution nor PW56. PW56 had indeed provided evidence to the same effectbut provided an important caveat:

> S: Baik. Boleh Dato' Seri ceritakan kepada Mahkamah, saya tidak merujuk kepada 1MDB, secara amnya, syarikat-syarikat MKD, what is the reporting line di MOF?
>
> J: Dia biasanya syarikat MKD pada ingat saya, pegawai akan laporkan kepada saya lah.
>
> S: Sorry, Dato' Seri?
>
> J: Pegawai akan laporkan kepada saya.
>
> S: That's generally ya?
>
> J: Ya. Generally.

S: Pegawai akan laporkan kepada Dato' Seri everything or certain things? A

J: Boleh kata semua kecuali dalam kes TIA, 1MDB, SRC dan anak-anak syarikat 1MDB.

[1439]I accept that when cross-examined by lead senior counsel, PW56 agreed B that the accused did not restrict him from performing his role as the Second Finance Minister, and as a matter of fact PW56 was still involved in SRC matters such as by approving the Treasury memo dated 2 February 2012 (D526), attending Cabinet meeting on 8 February 2012 and later approving the Treasury memo dated 4 November 2015 (D551) on the short term loan of C RM100m to avoid KWAP declaring an event of default on the financing to SRC.

[1440]However from his answers, it is clear that PW56 maintained his D evidence and explained that it was due to his concerns that he still had to get involved especially by instructing his officers to attend to the necessary vis a vis these two companies.

Whether there was supervision of SRC vide government machinery/BMKD E

[1441]There is some dispute as to whether there is evidence that BMKD was prevented from exercising its functions over SRC. The accused in addressing this matter simply denied there were impediments to BMKD's supervision of SRC to adhere to MKD guidelines although the move to convert SRC from F being a subsidiary of 1MDB to becoming an MOF Inc/MKD company was to ensure SRC adheres to BMKD's guidelines. The prosecution vehemently denied that it conceded that BMKD were not so prevented.

[1442]I agree with the assertion of the defence. There is no such evidence from G any of the witnesses from MOF, such as the two deputies Secretary General, PW44 and PW53.

[1443]Nevertheless the point I must emphasise is not that BMKD was H prevented, but instead that SRC did not follow the requirements of BMKD. Further I do not disagree with the prosecution's submission that being an MOF Inc company, SRC was emboldened by the fact that it was not answerable to BMKD as the reporting line was to the accused as the Prime Minister.

I

[1444]After all, the letter from SRC to the Prime Minister dated 9 January 2012 (P557) at para 3 reads:

SRC Reporting to the Government of Malaysia and MOF Inc:

A For avoidance of doubt, the Memorandum of Articles of Association of SRC will remain unchanged with SRC's Board of Directors, Managing Director and Chief Executive Officer ('CEO') all reporting directly to the Prime Minister of Malaysia.

[1445]Incontrovertibly, the accused wrote a minute on P557 expressly B agreeing with the proposal. He stated 'Bersetuju dengan cadangan ini. Sila uruskan perkara ini'.

[1446]In addition in another letter from SRC to the Prime Minister dated 2 December 2013 (D516), at para 6, it is stated in plain terms:

C

> Given that SRC is now 100% owned by the Minister of Finance, we would like to enhance our reporting structure from the Minister in-charge of EPU to now directly to the Ministry of Finance. In addition, on items of strategic and national security importance, SRC will report directly to YAB Prime Minister of Malaysia and/or the Economic and Financial Advisor to YAB Prime Minister of Malaysia.

D

[1447]Again, the accused noted his agreement, given his minute on the reporting to the MOF. He wrote 'Saya bersetuju SRC melaporkan kepada MOF seperti para 6'.

E

[1448]It is to be recalled that PW53 had previously testified that there was no supervision of SRC by MOF, even though MOF attempted to obtain information from SRC on its financial status without much success. PW56 too said much to the same effect, where his request to meet Nik Faisal went F unheeded.

Whether the appointment of PW44 as special advisor to SRC provided additional oversight

G **[1449]**The defence again submitted that the appointment of Datuk Mat Noor Nawi, a deputy Secretary General of Treasury (PW44) as special advisor at SRC indicates that there was supervision to be implemented over SRC to protect the interest of the government. I agree with the submission of the prosecution that nothing turns on this appointment. There is no evidence to show there was any H control that PW44 had managed to exert over SRC to protect the interest of MOF. This is attributed to the lack of clarity on his terms of appointment. He is not a director, but a special advisor, a position not even mentioned in the M&A of SRC.

I **[1450]**When examined by the prosecution, PW44 stated that his appointment was very vague and that he himself was unsure of his terms of appointment. Throughout his tenure, he only met with Nik Faisal twice to be briefed on the activities of SRC and that ultimately, he was of the view that the supervision of SRC was to be done by BMKD and not him. Thus in the notes of proceedings

dated 9 July 2019 — PW44:

S: Oleh kerana Dato telah diminta atau disentuh mengenai perkara itu. Boleh tak cerita sedikit sebanyak apa peranan melalui pelantikan yang dikatakan itu? Sebagai advisor to SRC.

J: Surat pelantikan tersebut tidak menjelaskan secara specific terms of reference saya sebagai penasihat SRC. Very simple letter. Maybe one page letter if I can remember. Jadi saya tidak tahu secara specific tugas saya tetapi saya mengambil kira the word advisor. Jadi saya perlu, bila mana perlu menasihati SRC dalam konteks ini, menasihati CEO nya. Nik Faisal. Dan sebagaimana yang saya bagitahu pagi tadi, atas inisiatif saya sendiri saya telah memanggil Nik ke office saya dalam tempoh tersebut sebanyak 2 kali untuk mendengar penjelasan beliau mengenai plan aktiviti of SRC,

S: Ya ringkasnya bahagian yang diwujudkan oleh MOF untuk mengawalselia atau to monitor syarikat MKD, SRC ini adalah bahagian mana?

J: Bahagian MKD.

Participation of accused at the Cabinet meetings and nexus with gratification

[1451]The accused gave evidence that he had no personal interest in SRC and that his presence in the Cabinet meetings was legitimate. He maintained that his presence is necessary in the said Cabinet meetings as it was his responsibility as MOF Inc in the said meeting. The accused firmly denies having any personal interest in SRC. At the end of the prosecution case I have found that the series of conduct and involvement, among others, on the part of the accused with respect to SRC (as analysed earlier, vis a vis his overarching control and the setting up, the financing, the guarantee, and the ownership structure, among others) when viewed in its totality and taken together, disclosed evidence which cannot be construed as purely being a lawful exercise of his official duty as either the Prime Minister, Finance Minister or advisor emeritus in SRC.

[1452]This is because such conduct and involvement, which is founded on the accused's position of overarching control in SRC, transpired beyond the ordinary and was outside the remit of usual conduct or involvement expected of a Prime Minister or Finance Minister, similarly circumstanced.

[1453]Such conduct and involvement exhibited by the accused, predicated on his controlling authority in SRC, instead serves only to demonstrate the existence of a private and personal interest on the part of the accused in SRC, which interest, in my judgment, is in the nature that is envisaged under the law to fall within the ambit of s 23 of the MACC Act, as explained previously.

[1454]The defence submitted that the three main cases relied on by the prosecution on this issue crystallise the fact that the element of 'use of position for gratification' has not been proven beyond reasonable doubt. The three are the Federal Court decision of *Public Prosecutor v Dato' Waad bin Mansor* [2005] 2 MLJ 101; [2005] 1 CLJ 421, the Court of Appeal decision of *Datuk Sahar bin Arpan v Public Prosecutor* [2007] 1 MLJ 697; [2007] 1 CLJ 326 and the High Court decision in *Public Prosecutor v Dato Haji Mohamed Muslim bin Haji Othman* [1983] 1 MLJ 245.

[1455]These cases have been found to support the prosecution case as discussed earlier. Thus, the entire transaction must be looked at to ascertain the design and conduct of the accused in its totality. Further, the physical presence of the accused is sufficient to constitute an offence under s 23(1) MACC Act whereby the mens rea of the accused is established if the accused ought to have known there was a conflict between his public duty and private interest.

[1456]As for the three cases, the defence submitted that they reflect the following:

(a) the nexus between the involvement of the accused in the impugned meetings (the failure to declare interest and recuse) were corrupt practice as at the time of the meetings the accused already had an interest and the decisions of the meetings directly caused the gratification ie the advantage either in terms of providing a company (wherein the accused had an interest as the real beneficial owner) with an asset or land application to oneself; and

(b) the act of participation in the meetings which had directly caused the 'advantage' (the gratification) was corrupt practice because at the time of the meetings the conflicting interest was co-related to an advantage (pecuniary or otherwise) which was directly linked to the decisions which were to be taken at the said meetings.

[1457]I cannot say I disagree with these conclusions as drawn by the defence from the three cases. But the defence then further contends that in contrast, in the instant case, the purported 'interest' of the accused found to have triggered the presumption under s 23(2) of the MACC Act, was his 'control of SRC'. And the impugned 'act or decision' was the accused's participation at the Cabinet meetings, more specifically, his failure to declare the interest and recuse.

[1458]It is contended that in order then for the element of 'use of position for gratification' to be established:

(a) the participation in the Cabinet meetings which approved the two government guarantees and by extension the RM4 billion financing to

SRC must be shown to have a direct cause to the impugned 'gratification' of RM42m (physical element of the offence);

(b) in participating in the said Cabinet meetings the accused must have been motivated by the intention to obtain the gratification of the RM42m (mental element); and

(c) collectively therefore, the RM42m received on 26 December 2014 and 10 February 2015 must have a causal link to the accused's participation at the Cabinet meetings in order to amount to the 'gratification' as per the MACC Act charge.

[1459]The defence maintained that these elements have not been proven beyond reasonable doubt.

[1460]In my judgment, the defence has failed to properly appreciate the application of the law to the factual matrix relevant to this charge. First, the interest of the accused in SRC in the context of s 23(1) is not merely his control of SRC without more. That is only the premise or foundation of the interest. The accused had the private interest to use SRC as a vehicle for his personal benefit and advantage by leveraging on his position of power and overarching control over SRC.

[1461]Secondly, the accused's participation at the Cabinet meetings which approved the government guarantees and thus the RM4 billion financing to SRC (which was in turn quickly drawn down to SRC) directly caused the accused to be in a position of access to much greater funds of the company, at any time and as and when he deemed necessary, including to the RM42m that flowed into his accounts in late 2014 and early 2015.

[1462]Thirdly, the reason for the participation was precisely the motivation for the intention to have access to much larger funds in SRC, which included the RM42m.

[1463]Fourthly, the RM42m received on 26 December 2014 and 10 February 2015 was as such a direct cause of the accused's participation at the Cabinet meetings. Such sum is the 'gratification' as per the s 23 of the MACC Act charge against the accused.

[1464]The defence seemed to suggest that the gratification which was received by the accused must be exactly as intended at the point when the accused engaged in the impugned act of participation at the Cabinet meetings without declaring his interest and withdrawing from the discussions at the meetings. This argument is flawed.

[1465]There is no requirement that the exact gratification such as the specific sum of RM42m in this case must be proved to have been criminally intended by the accused when he committed the criminal act of participation at the Cabinet meetings. Section 23(1) does not state that either. I accept that in *Thomas @ Severinus bin Kandadi v Public Prosecutor* [2009] 7 MLJ 803; [2009] 7 CLJ 561 the case which was already discussed at the end of the prosecution case, the High Court held that before criminal intent can be attributed to the appellant there must first be established a nexus between the RM9,995 which was said to be his gratification and his alleged abuse of position. It must be proved that at the time the appellant engaged in the impugned act, it was agreed that he would be given the RM9,995.

[1466]However as I have explained earlier, the factual matrix in that case is very different from that in the instant trial. There the appellant, the chief clerk with the health authority was accused of receiving gratification or a bribe from an external party which won a tender from the authority. The criminal intention in that situation could only be shown in relation to any agreement or understanding between him and the other party.

[1467]In contradistinction, here, the parties involved are the government (the Cabinet) and SRC. The accused headed the government and also had a private interest in SRC which he controlled. The approvals by the Cabinet benefited SRC which was controlled by the accused himself. There is no necessity for there to be any arrangement between the accused and any other party for gratification to be received to prove the presence of criminal intention.

[1468]It is also unrealistic in this situation for there to be a requirement that the exact sum of the gratification must be proven to have been intended by the accused at the time of his participation at the Cabinet meetings since it does not really matter what is the form or value of the gratification when the accused controls the entity and all its funds anyway. At the same time such a requirement would impose an intolerable burden on the prosecution to show evidence of intention when only the accused would be able to tell what his plans on the gratification were.

[1469]That, in my view, is why under s 23(1) of the MACC Act, the mental element is supplied by the failure of the accused to declare his interest and to withdraw from the meetings. Section 23(2) makes it clear that the presumption that the offence under s 23(1) has been committed is triggered when an accused takes any action on a matter in which he has an interest. This was exactly the situation in the instant case, and not the factual matrix in the case of *Thomas Kandadi*.

[1470]Furthermore, it is also strictly unnecessary to show that gratification was

actually received by an accused in a charge under s 23(1). Again, s 23(2) tells us that an accused who is an officer of a public body is presumed, unless the contrary is proved, to have used his position for gratification (the entire offence under s 23(1)) if he takes action on a matter in which he has an interest. I stress again that by participating in the exercise of his public duty function on a matter in which he has an interest (which he certainly must be aware of) it is readily inferred that he has the criminal intention to commit the offence of using his position for gratification in violation of s 23(1).

[1471]Indeed as against *Thomas Kandadi*, the factual matrix of this case before me is more similar to the three cases of *Public Prosecutor v Dato' Waad bin Mansor* [2005] 2 MLJ 101; [2005] 1 CLJ 421 (where the accused had taken part in a decision which benefitted a company in which he and his wife had a pecuniary interest by way of shareholding), *Datuk Sahar bin Arpan v Public Prosecutor* [2007] 1 MLJ 697; [2007] 1 CLJ 326 (where the accused, an EXCO member, had taken part in meetings and decisions with respect to three separate applications by a company owned by him) and *Public Prosecutor v Dato Haji Mohamed Muslim bin Haji Othman* [1983] 1 MLJ 245 (where the accused sat in meetings dealing with application for land made by himself).

[1472]But these three cases which concern the act of not disclosing an interest and of not withdrawing from relevant meetings dealt with the offence of 'corrupt practice' under s 2 of the Emergency (Essential Powers) Ordinance No 22 of 1970.

[1473]The defence also contended that in these three cases, the interest of each of the accused was present at the time of the relevant meeting and the decision taken had a direct gain to himself. This is correct. But so was the situation in the instant case where (albeit not in the nature of shareholding in SRC), the private interest of the accused is found to have been developed as enabled by the accused's overarching control of SRC, from the time of the establishment of SRC and its funding for the first RM2 billion, as analysed earlier at the end of the prosecution case. The private interest of the accused was already firmly in place when the two Cabinet meetings were convened, especially more so in the latter, since SRC had already become directly wholly owned by MOF Inc, a legal entity which under the Minister of Finance (Incorporation) Act 1957 is the Finance Minister. In the instant case, the accused himself.

[1474]It is worthy of emphasis that here, the accused had an interest in SRC. He participated at the Cabinet meetings which approved the SRC's application for the government guarantees. And the said decision to approve directly put the accused in a position that had access to more funds of SRC. The

gratification in terms of the advantage immediately became an entitlement of the accused, only for him to decide as and when it was essential for such funds be channelled for his own use.

[1475]In other words, the accused's participation at the Cabinet meetings which gave approval to the two guarantees (and thus the RM4 billion financing from KWAP to SRC) was the direct cause to the impugned gratification of the RM42m. This is what the defence described as the actus reus of the offence. The approvals made the accused became entitled to whatever additional funds that would flow into the accounts of SRC (in respect of the property of which he was entrusted with dominion), to be utilised as and when the accused chose to. That occurred in December 2014 and February 2015.

[1476]As for the mens rea, the participation at the Cabinet meetings must be shown to have been motivated by the intention to obtain the gratification of the RM42m. This has also been shown to be the case, given the deliberate failure on the part of the accused to declare his interest in SRC which supplied the mens rea of the offence. In any event, the accused must have known that given his controlling interest in the company, the approval would immediately consequent upon presenting him with access to very much more sizeable funds in SRC.

[1477]There is therefore no valid basis for the defence to contend that the element of 'use of position for gratification' in s 23(1) has not been proved beyond reasonable doubt. The facts and evidence plainly demonstrate otherwise. At the same time neither has the defence been able to cast any reasonable doubt that the element has not been proved. In any event it is for the defence to rebut the presumption that the accused by his participation at the Cabinet meetings on the SRC's government guarantee requests in which he had an interest had used his office for gratification. The defence has not successfully rebutted this presumption on a balance of probabilities, or at all. The ingredients of the said charge have therefore been proved beyond reasonable doubt against the accused.

Whether defence of national interest and invocation of s 23(4) applicable

[1478]The onslaught by the defence against the prosecution case, with all guns blazing came from different directions. Some are repeat attacks albeit launched from what may appear to be different context. I will consider all of them all the same.

[1479]This is a key defence of the accused in relation to this charge under s 23(1) of the MACC Act, in that he was merely acting in accordance with 10th Malaysia Plan and the National Energy Policy. This was earlier put to the

relevant prosecution witnesses and unsuccessfully raised in submissions by the defence at the end of the prosecution case. This has also been raised in the defence's argument about the role of the accused in the setting up of SRC. Here the defence reiterated that the accused could rely on s 23(4) of the MACC Act.

[1480]An important point reiterated by the accused in his testimony is that the monies of SRC being transferred overseas were to be placed in custodian banks for time deposits purposes. This is reflected in the shareholder minutes in P530 and P501. This is also consistent with the evidence of PW39, the chairman of SRC that these transfers were effected in order to mitigate the negative carrying costs of the loans, as an interim measure pending actual investments.

[1481]At first blush this seems very reasonable. In simple terms the financing to SRC comes with cost in the form of 'interest' (or the profit rate in this Islamic financing) payable by SRC to KWAP which then was higher than any income that the financing proceeds could generate given the absence of investments at that time. Hence the temporary measure of placing the financing proceeds in time deposits which generate interest income for the same.

[1482]However, this lack of ready investments is perplexing given that even the accused testified that the financing requests at KWAP were expedited as communicated to PW45 (in respect of the first financing) because SRC was in urgent need for funds to take advantage of some investment opportunities. PW43 at MOF also testified that he was told by PW45 that the request for drawdown by KWAP before formalisation of the second government guarantee (in relation to the second financing) was conveyed by the accused to PW45 because SRC needed funds urgently.

[1483]In other words, for the first and second financing, all the haste was to accommodate SRC which was represented by SRC and the accused to have been in very urgent need for large sums of monies for investments in the energy sector overseas. However, what in fact transpired was that upon the drawdowns of the two separate financings of RM2 billion each, the funds were immediately transferred out of the account of SRC.

[1484]There was some obvious degree of disconnect because the board of directors of SRC appeared not to be in the know about the rush for investments, which in any event is not inconsistent with their own resolution to apply for the RM2 billion financing on the two occasions, which for all intents and purposes followed the shareholder minutes issued by the accused as the MOF Inc. on the same.

[1485]The argument of the defence is that the first RM1.8 billion and the second RM1.8 billion were not utilised but placed in time deposits. PW39

testified that the first RM1.8 billion was to be transferred overseas not as per the shareholder minute in P530 which spoke of the deposit into accounts to be opened by SRC itself overseas but instead towards an advance to CP BVI as discussed in the meeting of the board of directors of SRC on 13 September 2011 (P498), as well as the meeting of the directors with the bankers on 14 September 2011 and the SRC's DCR (P521 and P522). In respect of the second RM1.8 billion, PW39 stated that the shareholder minute from the accused as MOF Inc (P501) provided for the transfer of the funds to SRCI (previously CP BVI).

[1486]The defence highlighted that as a matter of fact, the RM4 billion was disbursed out of the accounts of SRC on 28 August 2011 and 30 March 2012 not in pursuance of any of the shareholder minutes of the MOF Inc or any of the DCR or other resolutions of the meetings of the board of directors of SRC. This suggests that not only did the directors not follow the shareholder minutes of the accused in respect of resolution pertaining to the funds. But that the actual disbursement out of the SRC's bank account was also not in accordance of any directors or shareholders resolutions.

[1487]The directors not following exactly what had been resolved at the shareholder level as expressed in the shareholder minutes is not entirely surprising, for two reasons. First, the substance of the decisions in the shareholder minutes, which was to place the funds overseas was adhered to by the directors. The directors were concerned about negative carry losses. Whether it was opened in the name of SRC or its subsidiary SRCI is in the context inconsequential. Secondly, at all times, the board of directors were advised and apprised by its then CEO, Nik Faisal, who represented himself to the directors (PW39 and PW42) to be the link between the directors of SRC and the accused. The decisions of the directors were still consistent with and acceptable to Nik Faisal and the accused.

[1488]But the fact that unknown to the directors of SRC, the disbursements were made prior to any resolutions authorising any form of placement and deposits can only point to the decision taken by Nik Faisal and those associated with him. And the accused then knew about it but chose not to do anything about it, leaving the matter to be handled by the board of SRC. In any event there is no evidence as to the status of the RM4 billion at present. In the notes of proceedings dated 21 January 2020 — DW1:

> S: Even then you knew because it was reported to you by Nik Faisal that the money had gone overseas?
>
> J: Yes.
>
> S: And you didn't inquire to it.
>
> J: Yes, but it was supposed to be transit, to make an investment.

S: Yes sir. Cannot be in transit for good 7 years, sir. It's a very long transit.

J: Well, that's their responsibility to invest.

S: It is also your responsibility sir. Are you saying you have no responsibility?

J: No, I am not saying that. No.

[1489]The defence submitted that matters after the Cabinet meetings cannot form the basis to establish the motivation of the accused at the time of the meetings.

[1490]However, there is no paucity of evidence which shows the involvement of the accused in the series of conduct and decisions leading to and at the two Cabinet meetings. Thus, when EPU did not concede to 1MDB's request for a government grant to SRC, the accused readily endorsed SRC's loan application to KWAP, said to be to propel SRC as the special purpose vehicle to help Malaysia achieve its goals in accordance with 10th Malaysia Plan, and issued requests and instructions to key officials of KWAP. Conveniently, when there was a need for the financing to be secured by a government guarantee, he again got involved and dealt with the top officials of the MOF with the view to facilitating and expediting the process, said to further the interest of SRC.

[1491]Eventually the accused made himself available to chair and then remained present in the relevant Cabinet meetings to approve the guarantees for the total RM4 billion financing to SRC from KWAP, again, according to the accused, in order to be in line with national interest. But his motivation at the time of the Cabinet meetings was simply one to ensure that the guarantees be approved and hence the financings could proceed, which would directly result in massive funds be obtained by SRC which the accused had a controlling interest, in a manner that could as and when the accused deemed fit, procure company funds to be utilised for his personal benefit.

[1492]The crux of the defence of the accused is that his actions were intended to serve national interest, in line with the 10th Malaysian Plan and the national energy policy, vis a vis his promotion of SRC. Importantly, the defence argued that the accused would fall within the exception under s 23(4) of the MACC Act.

[1493]The prosecution repeated the contention that for s 23(4) to apply, it must be shown that the action taken by the accused which led to the decision by the Government of Malaysia to grant the two government guarantees in favour of SRC was done in the interest or for the advantage of Government of Malaysia, which it clearly was not.

[1494]From the evidence of Tan Sri Irwan (DW3), the prosecution submitted that the government guarantee should never have been given because SRC had not demonstrated its ability to repay the loan. It also had no track record or relevant experience in energy in relation to the extraction, processing, logistical services and trade of natural resources. It certainly was not in the interest of the government to have given both the guarantees. And as expected, the loans were never repaid by SRC and the government has been honouring its guarantees by making periodic payments to KWAP to avoid the loans from being recalled.

[1495]Once drawn down into the accounts of SRC, the accused then issued shareholder minutes (P385 (in the exhibit attached to the relevant DCR), P501, P530(8) and D534) which contained instructions on the utilisation of the funds obtained from the financing extended by KWAP. Yet, none of these shareholder minutes demonstrated that the instructions of the accused were in line with the justifications and recommendations outlined in the Cabinet papers, namely for the energy and for extraction, processing, logistical services and trade of natural resources. At the same time, this again shows the actions of the accused in micro-managing the affairs of SRC which even went to the extent of him directing the disbursement of the entire proceeds of the RM4 billion financing from KWAP.

[1496]In addition, as discussed earlier, the refusal of the accused to allow the request by the Second Finance Minister (PW56) to lead a delegation to Switzerland to clarify with the Swiss authorities on the status of funds belonging to SRC which remained frozen by the authorities for the most specious of reasons when the accused himself did not have a plan to recover the funds is further testament that his actions were anything but for the advancement of national interest. Nor can it benefit from s 23(4) of the MACC Act.

[1497]I have analysed the national interest contention and the relevance of s 23(4) at the end of the prosecution case. I doubted that the accused could be deemed as an officer in SRC and the representative of the government. Clearly, he was not an officer. He was involved because the Prime Minister — which he then was — was granted with special powers in the M&A of the company. That cannot be translated as the accused being an officer of SRC. Nor can his role (MOF Inc) as the shareholder of SRC be construed as an officer of SRC. I also found that in any event, the complete answer to the defence's submission on this issue is that s 23(4) cannot apply in this case because it has not been shown that the actions taken by the accused which led to the decision by the Government of Malaysia to grant the two government guarantees in favour of the financing to SRC was done in the interest or the advantage of Government of Malaysia.

[1498]I have earlier set out seven reasons why this could not has been the case. None of these have been rebutted by the defence case. Briefly, these were — first, the government guarantees were to secure the RM4 billion loan extended to a newly established company with no track record or relevant experience; secondly, this massive financing of RM4 billion was made possible after a RM3 billion grant request was declined by the EPU who had suggested that funding should be sourced from the commercial banks or the capital markets, to avoid unnecessary exposure to the government, but only for the accused to ask KWAP a public pension fund provide the RM4 billion financing to SRC; thirdly, the Cabinet papers and the MJM were prepared in a rushed manner without sufficient evaluation where even the information on SRC and its future plans could not be verified; fourthly subsequent to the drawdown of the loans to SRC, despite it being a matter within the remit of the management of the company, the accused as MOF Inc issued shareholder resolutions on the subject of the deposit of the funds of SRC outside the country, which had absolutely nothing to do with the justifications for the financing stated in the Cabinet and KWAP investment panel papers, namely for the extraction, processing, logistical services and trade in natural resources.

[1499]Fifthly, unsurprisingly, SRC failed to service its debts to KWAP and thus required funding from the government to avoid the declaration of an event of default by KWAP, necessitating a further three short term loan facilities totalling about RM600m to pay for the interest on the RM4 billion financing. The loans were never repaid by SRC, and the government has been honouring its guarantees by periodic payments to KWAP; sixthly, the attempt by PW56, the Second Finance Minister to travel to Switzerland to verify the status of the funds of SRC in BSI Bank allegedly frozen by the Swiss authorities was denied by the accused; and seventhly, the RM42m from SRC, found its way into two of the accused personal bank accounts in December 2014 and February 2015, to be utilised by the accused for his personal benefit.

[1500]The defence of the accused does not add anything new of substantive worth and is not able to change the finding at the end of the prosecution case that the actions by the accused was not for the advancement of national interest and that evidence does not warrant the invocation of s 23(4) of the MACC Act.

[1501]Given the above, under no circumstances could the actions taken and decisions made by the accused at the two Cabinet meetings be said to be for the interest or advantage of the government.

[1502]The defence submitted that the evidence of DW3 did not say that the government guarantees should not have been given. The defence maintained that DW3 cited that the ability to repay was a factor when government guarantees is given to private companies. The defence submitted that SRC on

A the other hand was an MOF Inc company when the guarantees were approved, indirectly held through 1MDB at the time of the first approval by the Cabinet, and directly owned by MOF Inc at the time of the second. The defence also contended that in both Cabinet papers (P537A and P537B), the status of SRC as an MOF Inc entity were expressly noted as being one of the justifications for
B the government guarantees to be given.

[1503]It is correct that DW3 did not testify that the government guarantees should not have been approved for the financing by KWAP to SRC. He made it clear, as supported by evidence that he was not involved at the approval stage.
C But as I have shown in my analysis earlier when discussing the evidence of DW3, the key point made by DW3 on this subject (despite attempts by learned counsel to elicit what the defence now submitted, somewhat inaccurately, what DW3 had said) is that, even for a new government owned company with no
D track record but undertaking a national interest project, the MOF would look at the income generating capacity of the underlying project, in order to ascertain its repayment ability.

[1504]This includes the examples explained by DW3 which are the Bakun
E Dam and the second Penang bridge project, where the feasibility of the underlying projects was critical. As a matter of fact, these two examples of government owned entities were provided by learned counsel to DW3 during his examination-in-chief. In contrast, SRC was a new company without any track record, and crucially without any definitive underlying projects, thus
F denying even the basis upon which any potential income generating repayment ability could be tested.

[1505]The contention that the Cabinet papers stated that SRC was a government entity is therefore inconsequential. DW3 explained that he
G himself approved the MOF memo for the second government guarantee with the accompanying Cabinet papers (P527A/B) because he believed that they had already gone through very detailed discussions. PW45 too in respect of the first government guarantee approved the MOF memo (P547) agreeing it was business as usual because the requirement for the guarantee had already been
H made by KWAP. And the Cabinet approved the Cabinet papers for the two guarantees which included the statement in paras 3 and 4 of P537B and paras 3 and 8 of P527B that SRC was a company with no track record. This, so the defence submitted, was immaterial to the Cabinet which approved the two guarantees because the intended activities of SRC were towards national
I interests.

[1506]The defence misses the point. There is no dispute that the process at KWAP, MOF and the Cabinet were all, albeit rushed, generally adhered to. The relevant party entrusted with the approving authority made the decisions, not

the accused. That has been established. The approvals could have resulted from a genuine and lawful decision — making process in KWAP, MOF and the Cabinet in relation to the ability of SRC to pursue its national objectives. But these decisions were also the result of the involvement of the accused in the relevant processes at KWAP, MOF and the Cabinet. The integrity of the processes was impaired. The point of contention is the series of conduct and decisions made by the accused outside the remit of due process vis a vis the top officials in KWAP and MOF concerning the financing and the government guarantee, including his participation at the relevant meetings of the Cabinet, without which the financing and the guarantee would not have materialised.

Whether it must be proven that RM42m was derived from RM4 billion

[1507]Furthermore, there is no requirement for the prosecution to prove that the RM42m that had found its way into the accounts of the accused was part of the RM4 billion financing loan granted to SRC. There is no dispute from the evidence, including the money trail that the RM42m was taken out and debited from the bank account of SRC. As long as it can be shown that the accused intended to obtain monies belonging to SRC as a result of the decision made by the accused when there is a conflict of interest, the offence is in this context, complete. There is no necessity to prove that the exact monies that went into the accused's private bank accounts must be part of the RM4 billion loan. The proof required is that the funds in questions was the property of the SRC. How that funds came about to be part of the properties of SRC is irrelevant.

[1508]In any event, the charge does not specify the nexus between the RM42m and the RM4 billion and it is also not an ingredient of an offence under s 23 of the MACC Act or s 409 of the Penal Code that the gratification must be derived from the funds involved in the approval which was participated by an accused.

[1509]In any event, for whatever it is worth, the accused himself admitted that most of the funds in SRC were from KWAP when he said, in the notes of proceedings dated 7 January 2020 — DW1:

> S: Semua tak mengurus, susahlah Dato' Sri. You will agree Dato' Sri that the SRC funds are all monies obtained from a loan from KWAP? Apart from the RM20million earlier was paid by EPU?
>
> J: Basically most of it is from the loan, KWAP loan. Yes.

Whether the conduct of the accused after draw down of the financing from KWAP weakens defence

[1510]A significant if not very telling evidence that further supports the case of the prosecution is the especially contrasting course of conduct taken by the accused before and after the entire RM4 billion loan from KWAP was disbursed to SRC.

[1511]The accused was consistent in his testimony that SRC was established to pursue the national strategic initiative of promoting alternative energy resources such that his involvement in the process leading to the approval of the loans by KWAP investment panel and the two government guaranteed by the Cabinet (like in respect of the first loan, the accused telling PW45 the Secretary General of the Treasury and Chairman of KWAP that the approval process by KWAP be expedited, and RM2 billion would suffice — which the accused admitted to in cross-examination; and in relation to the second loan, asking PW45 to write to KWAP to release the RM2 billion even before the formalities of the government guarantee agreement were finalised by MOF) was merely to facilitate and expedite the process so that the requirements of SRC on the investment opportunities told to him by SRC, or Nik Faisal in particular, could be fulfilled, in line with the strategic interest for which SRC was formed. I have found this to be untenable.

[1512]There are at least three other problems with this testimony. First, apart from the EPU's memo in response to the request by 1MDB for the RM3.95 billion grant to set up SRC to pursue the said strategic national initiative, there is no other evidence of any official governmental documents discussing let alone proposing the establishment of SRC, despite the massive financial and capital commitments required by SRC for the said strategic initiative.

[1513]Secondly, it is not expected nor proper that as the sitting Prime Minister then, the accused would be interested to personally assist SRC, one of the hundreds of MOF Inc owned companies to get its applications for loans and government guarantees, approved, and in expedited manner. Thirdly, there is no evidence of any robustly verified concrete investment opportunities that justified the release of the loans to SRC.

[1514]Those concerns aside, the point now is that after the release of the entire RM4 billion loan to SRC, the conduct of the accused seems very inconsistent with his involvement prior to. The cross-examination of the accused revealed in clear fashion a number of conclusions that do little to bolster his defence.

[1515]First, there is no evidence that shows that the accused was even concerned with the use of the funds loaned to SRC by KWAP, both in terms of

the fact that the monies was sourced from the country's retirement pension fund, hence part of the public funds, as well as whether the pursuit of promoting the national energy strategic initiatives was anywhere closer to be met.

[1516]Thus, even though the accused was insistent that such manner of oversight would be within the responsibility of the board of directors of SRC, and not his, considering his understandably busy schedules as the Prime Minister of the nation, this line of argument is in my judgment, in the context of this case, seriously lacking in credibility.

[1517]This is because the unexplained transfer and fate of an enormous amount of monies from SRC's account, a wholly owned company of the MOF Inc, which monies was originally sourced from the country's retirement fund must surely bother any responsible leader of this country. Even if a Prime Minister knew nothing about the matter until the problem surfaced, such a responsible leader would have taken immediate steps which could most probably have included contacting his counterpart in the country in question to try resolve the matter. The accused however did not offer any such evidence.

[1518]It is especially difficult to accept that line of argument by the accused in this case since the accused, as the Prime Minister and Finance Minister at the time actually had the knowledge about and had himself been directly involved in the process on the loans granted by KWAP to SRC as guaranteed by the government, purportedly on the basis of the stated purposes of the loans being for national interest.

[1519]In such a situation, the accused's lack of action to recover the funds stated to be frozen by the Swiss authorities for alleged money laundering is therefore very puzzling and is instead much more consistent with the conduct of one who did not want the problem resolved given his own complicity in the unlawful transfer of the funds in the first place, as evidenced in the shareholder minutes of MOF Inc notwithstanding his belated claim that these minutes were not genuine.

[1520]Not only that. It was clear by the end of 2015 that SRC was facing financial difficulties. The MOF memo of 4 November 2015 raised the need for the first of what later resulted in three short term loans to SRC to avoid KWAP declaring an event of default against SRC that would call upon the government guarantees. The accused was supportive of the efforts on the short term loans but did not even summon the directors of SRC to provide an explanation to him despite being the advisor emeritus and the Prime Minister who had vast powers under the M&A of the company, including in nominating the directors to serve the board of SRC in the first place.

[1521]And the accused also disagreed with the assertion that the RM4 billion had since disappeared, insisting that that fact has not been established. Never mind the accused himself offered no evidence to show that he had taken any steps to ascertain what exactly has happened to the said funds.

[1522]I have also dealt with the testimony of the accused in respect of the evidence given by PW56. The former refused the latter's request to travel to Switzerland on account of the absence of a proper plan, yet did not tell that to PW56. Neither did the accused himself formulate one to be put in action to recover the funds.

[1523]Furthermore, the accused could not provide a clear answer to the question whether he was satisfied with the progress of SRC after the first drawdown of the RM2 billion before agreeing to support the second RM2 billion financing. There was a period of about six months in between the two Cabinet meetings. The accused claimed that he did ask and was told that the monies had been set aside for immediate investment requirements, but did not inquire further.

Whether the accused informed the second Cabinet meeting of true investments from first financing

[1524]In addition, during cross-examination, the accused also agreed that the Cabinet at its meeting deliberating on the second government guarantee, was not made aware that no energy ventures were embarked on by SRC in respect of the first financing by KWAP, a fact known to the accused.

[1525]This, according to the accused was therefore a matter for the board of directors to oversee. The accused also disagreed that there was a duty to update on the status of the disbursement of the first loan secured by the first government guarantee when the proposal for the second government guarantee was tabled at the meeting of the Cabinet. Again, I find this hard to fathom when the source of the funding was the pensions fund and the sum involved was extremely large by any measure. When shown by the learned attorney general, the accused agreed that the paper to the Cabinet for the second government guarantee did contain some information on the purported investments from the first loan but that the information seemed to differ from the proposal paper tabled to the investment panel.

The use of presumptions

Section 23(2) of the MACC Act

[1526]It is the defence case that the statutory presumption in s 23(2) of the MACC Act was displaced by this court making actual findings of fact that the accused had used his position for gratification and further the gratification was obtained. As such the defence submitted that it does not need to meet the higher burden of rebuttal on a balance of probabilities and only needs to raise reasonably doubt on the actual findings.

[1527]This submission of the defence refuses to understand the summary of findings which this court pronounced when calling for the defence of the accused on all seven charges, including the one for the offence under s 23(1) of the MACC Act.

[1528]I have in the summary of my findings gone into some degree of details before concluding that on the maximum evaluation of the totality of credible evidence, the question as to whether the decision made or actions taken by the accused was in relation to any matter in which he had an interest could only be answered in the affirmative. And it is precisely because of this finding, that I went on to say that this therefore meant that the presumption under s 23(2) of the MACC Act applies to the effect that the accused is thus legally presumed to have used his office or position for gratification.

[1529]Even though I have, in my summary findings at the end of the prosecution case alluded to the conclusion that the accused's participation in the Cabinet meetings in 2011 and 2012 was the act which amounts to the abuse of position, since it was for the purposes of obtaining gratification, and which materialised when the RM42m was received by him in late 2014 and early 2015, this does not in any way negate or displace the application of the presumption against the accused.

[1530]There was no analysis on my references to the accused using his position for gratification other than there is evidence of the receipt of the RM42m (which I also stated to be a subject of analysis in the section on the CBT charges in this judgment). This is no basis for the defence to take the position that the presumption which I had specifically invoked upon finding the satisfaction of the pre-requisites under the said s 23(2), could somewhat be conveniently disregarded.

[1531]I am not unmindful of the mischief that presumptions seek to remedy, as explained by the High Court in *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705where Augustine Paul J (as he then was) held:

> The applicability of the presumption provisions must be considered against this background. Their language shows that they have been enacted to provide evidence of the facts to be presumed upon proof of the basic facts. It is these basic facts that raise the presumed facts. Thus they contemplate a situation where there is no evidence of the facts to be presumed.Where there is such evidence and the presumption provisions are still invoked it would mean that what has been proved to exist has, at the same time, also been presumed to exist. This is illogical as it would amount to facts which have been proved as also having been presumed. *This would go beyond the explicit words and object of the presumption provisions as they are designed to meet a situation when there is no evidence of the facts to be presumed.* As I said earlier presumptions are only a special mode of proving facts which must otherwise be proved by evidence ... The limitation on the use of the presumption provisions in the face of available evidence can be discerned if the ramifications of their use in such circumstances are considered. It must first be observed that reliance on the presumption provisions where there is available evidence of the facts to be presumed will be unfavourable to the accused. This is because where the court relies on a statutory provision relating to a presumption of law like the presumption provisions it is bound to take the fact as proved until evidence to the contrary is given, on a balance of probabilities, to disprove it (see *PP v Yuvaraj* [1969] 2 MLJ 89; *Nagappan a/l Kuppusamy v PP* [1988] 2 MLJ 53). *This results in a legal burden being imposed on an accused person though it is not illegal.* Failure to discharge the burden, even where a reasonable doubt as to guilt exists, will be followed by conviction (see *State v Mello & Anor* [1999] 1 LRC 215). However, if the court had acted on the available evidence in proof of the relevant ingredients without resorting to presumptions there is only an evidential burden on an accused person to raise a reasonable doubt. Thus indiscriminate use of presumptions when there is evidence of the facts to be presumed will be unfavourable to the accused as it will place a heavier burden on him which could have been avoided. *Fairness to the accused therefore demands that the presumption provisions are used only when there is no evidence of the facts to be presumed.* (Emphasis added.)

[1532]I make three observations. First, I accept that fairness to an accused therefore demands that the presumption provisions are used only when there is no evidence of the facts to be presumed. But the case also states that it is not illegal to invoke the presumptions when there is evidence of the facts to be presumed. Secondly, my summary did not state whether there is evidence of the facts to be presumed.

[1533]Thirdly, the nature of the presumptions must also be appreciated. Unlike the more straightforward statutory presumption like that of trafficking under the Dangerous Drugs Act 1952 where under s 37(da) an accused who is found to be in possession of, for example, 50g or more in weight of methamphetamine is presumed to be trafficking in the same. Under the presumption under s 23(2), more elements are involved; whereby an accused is presumed to be using his office for gratification — effectively the whole of the offence under s 23(1) — if he is proved to have taken any action in respect of a matter in which he has an interest.

[1534]In other words, an accused is presumed to commit the whole of the offence under s 23(1) (not merely any single ingredient like that of trafficking under the Dangerous Drugs Act 1952) if he can be proved to have engaged in a conduct as envisaged under s 23(2).

[1535]In any event, considering the entirety of the evidence in this case, I find that the defence has failed to even raise a reasonable doubt in the prosecution case under s 23(1) of the MACC Act, much less succeeded in rebutting the statutory presumption under s 23(2) of the same Act on a balance of probabilities.

Presumption under s 50 of the MACC Act

[1536]In delivering the summary of my findings when calling for the defence of the accused on 11 November 2019, this court did not however mention that the presumption under s 50 of the MACC Act to be applicable. This provision reads as follows:

> 50 Presumption in certain offences
>
> (1) Where in any proceedings against any person for an offence under section 16, 17, 18, 20, 21, 22 or 23 it is proved that any gratification has been received or agreed to be received, accepted or agreed to be accepted, obtained or attempted to be obtained, solicited, given or agreed to be given, promised, or offered, by or to the accused, the gratification shall be presumed to have been corruptly received or agreed to be received, accepted or agreed to be accepted, obtained or attempted to be obtained, solicited, given or agreed to be given, promised, or offered as an inducement or a reward for or on account of the matters set out in the particulars of the offence, unless the contrary is proved.

[1537]Section 3 of the MACC Act defines 'gratification' widely to include money or any similar advantage. As evidence has shown that the accused did receive the sum of monies of RM42m in his personal accounts, this presumption should thus according to the prosecution operate against the accused who should rebut the same on the balance of probabilities.

[1538]The defence maintained that since this court did not invoke s 50, it is therefore inapplicable. The non-applicability of a presumption which was not applied at the close of the prosecution case was touched on by the Court of Appeal in *Uche Francis Chukwusome v Public Prosecutor* [2016] MLJU 1170 where the following was stated:

> [31] Indeed, the learned trial judge found that the appellant had custody and control of the capsules based on the fact that the capsules were found in the abdomen of the appellant. The learned trial judge relied on *Tunde Apatira* where the drugs in question were found in packets within the stomachs of the appellants and the Federal Court ruled that the appellants were in actual possession of the drugs.

> The finding of the learned trial judge on the physical element was therefore correct. There was no need to resort to the presumption of possession under s 37(d) of the Act. *We noted that in fact, the learned trial judge did not invoke s 37(d) presumption at the end of the prosecution's case.*
>
> ...
>
> [48] *We found no error of law or fact by the learned trial judge, except where His Lordship stated that the appellant failed to rebut the s 37(d) presumption at the end of the defence case when no such presumption was invoked at the prosecution's case*. (Emphasis added.)

[1539]The prosecution on the other hand contended that once gratification is received in that RM42m was received in the accused's personal bank accounts, the legal presumption under s 50 of the MACC Act would be triggered. The court is thus obliged to invoke the presumption under s 50 of the MACC Act. The prosecution refers to the case of *Attan bin Abdul Gani v Public Prosecutor* [1970] 2 MLJ 143b where Sharma J held as follows:

> The learned president having found as a fact the sum of $50 was received by the appellant from PW1, the presumption under s 14 of the Prevention of Corruption Act 1961 obviously arose in the case. The presumption is that the gratification as defined in the Act was received corruptly and as an inducement to charge PW1 under a lesser charge. I may add that the words used in the English version of the charge against the appellant, viz '... as an inducement for forbearing to do an act in relation to your principal's affairs, to wit, reducing the charges against the said Latip bin Muslim ...' are not as intelligible as the Malay version of the charge. In any event the charge was fully understood by the appellant and everyone knew what it was. No objection was taken to the wording of the charge either at the trial or on the hearing of the appeal. *Once it is proved that the gratification has been paid or received then in the words of s 14 of the Act 'Such gratification shall be deemed to have been paid or given or received corruptly ... 'The presumption at once arises under the section. This presumption is a presumption of law and it is obligatory on the court to raise it in every proceeding for an offence under s 3 or 4 of the Act provided it is proved that the gratification had been paid, given or received*. The prosecution has not to establish anything more than the payment of money (see *State of Madras v Vaidyanatha Iyer* AIR 1958 SC 61 and *Emden v State of Uttar Pradesh* AIR 1960 SC 548). It then becomes the duty of the accused to disprove what s 14 begins to presume against him. For what is the degree of proof required of the accused see *Rex v Carr-Briant* [1943] KB 607, *Saminathan v Public Prosecutor* [1955] MLJ 121 and *Otto George Gfella v The King* AIR 1943 PC 211. The presumption cannot be said to have been rebutted without sufficient evidence, ie such evidence as is reasonably sufficient to invite belief in its probable truthfulness. It was very strongly urged that as the defence was one of non-receipt of the money there was no onus on the appellant to prove 'the contrary' suggested in s 14. The argument is fallacious because the presumption comes into operation only when the factum of payment is proved as it was to the satisfaction of the learned president in this case. If payment is not proved the presumption does not arise and consequently there is nothing which the accused is required to prove to the contrary. (Emphasis added.)

[1540]It is observed that the case of *Mohd Khir bin Toyo v Public Prosecutor* [2015] 5 MLJ 429 the Federal Court held that once the prosecution had satisfied the condition or conditions precedent, the trial court was under a legal compulsion to invoke the presumption. Jeffrey Tan FCJ held at as follows:

> [104] Pursuant to s 42(3) of the ACA 1997, upon proof that such person accepted or attempted to obtain any valuable thing without consideration or for a consideration which such person knows to be inadequate, 'such person shall be presumed to have done so with such knowledge as to the circumstances as set out in the particulars of the offence, unless the contrary is proved.' In the instant case, it was proved, albeit prima facie, that the appellant accepted a valuable thing for a consideration which he knew to be inadequate. That satisfied the condition precedent for the invocation of s 42(3) of the ACA 1997, which provided that it shall be so presumed. *The expression 'shall be presumed'…have the same import of compulsion. Therefore the same has to be understood as in terrorem ie in tone of a command that it has to be presumed that …' (T Shankar Prasad v State of Andhra Pradesh 2004 (3) SCC 753 at p 407). It was obligatory on the trial court to invoke the presumption* (*The State of Madras v A Vaidyanatha Iyer* 1958 SCR 580 at p 590; *T Shankar Prasad v State of Andhra Pradesh* 2004 (3) SCC 753 at p 766) which could not be ignored (*Hyderabad v G Prem Raj* (2010) 1 SCC 398 at p 406). *Once the prosecution had satisfied the condition or conditions precedent, the trial court was under a legal compulsion to invoke the presumption* (*Madhukar Bhaskarrao Joshi v State of Maharashtra* (2000) 8 SCC 571 at p 148). (Emphasis added.)

[1541]That the presumption arises from the operation of law as the statutory language in s 50 of the MACC Act and as in other provisions in other legislation uses the mandatory word 'shall', is also emphasised by another decision of the Federal Court in the case of *Public Prosecutor v Zulkifli bin Arshad* [2011] 1 MLJ 599 where in respect of the presumption of possession in the Dangerous Drugs Act 1952 Hashim Yusoff FCJ stated the following in clear terms:

> [23] With respect, the case of *Public Prosecutor v Abdul Rahim* can be distinguished on the facts. In the instant appeal, the learned trial judge found as a fact that the respondent was in actual possession of the drugs in the car and in the house PS31–3. So did the Court of Appeal. The only flaw, as submitted, is that both the High Court and the Court of Appeal did not invoke the presumption under s 37(da)(vi) of the Act. *But on the facts and evidence of this case that should not be fatal to the prosecution. We are of the view that having been established as a fact by the trial judge that there was actual possession of the drugs by the respondent, the weight of which exceeded 200g of cannabis, then the statutory presumption under s 37(da)(vi) must come into play …*
>
> [26] The same applies to the failure of the Court of Appeal for not applying the presumption under s 37(da)(vi). Be that as it may, *we feel that on the evidence adduced by the prosecution, and upon the failure by the learned trial judge as well as the Court of Appeal to invoke the presumption, it is incumbent upon us to do so in accordance with the provision of s 37(da)(vi) of the Act.* (Emphasis added.)

[1542]In similar vein, the Court of Appeal in another drugs trafficking case held that if the conditions for the application of the statutory presumption of possession are met, the trial court has no option but must invoke the presumption. Thus in *Chew Sam Poh v Public Prosecutor* [2015] 4 MLJ 252 it was held that:

> [26] It is the duty of the court to invoke and give effect to the presumption under s 37(d) of the DDA even where there is evidence from which to draw the inference of knowledge. Parliament in its wisdom has deemed it fit to presume knowledge once custody or control of any dangerous drug has been established. To omit invoking the presumption would be to ignore the intention of the Legislature. It will give the impression that Parliament had legislated in vain, which it does not ...

[1543]There is however a line of authorities, albeit mainly in drugs trafficking cases which hold that the presumption should be specifically invoked by the trial court if it is intended to be applied against the accused. This position plainly does not accept that the statutory presumption arises by operation of law upon establishment of the requisite finding or that its application is mandatory following such finding.

[1544]The Court of Appeal in *Public Prosecutor v Martinus Esterhuizen* [2015] 2 MLJ 735 favours the proposition that it is for the trial court to make that determination whether the presumption is triggered. It was thus held:

> [9] *To recapitulate, at the end of the prosecution's case, the learned trial judge had found that the prosecution had made out a prima facie case*. The learned trial judge had made an affirmative finding of possession of the drugs by the respondent and had found a prima facie case of trafficking under s 2 of the Act. *His Lordship did not invoke any of the presumptions, either presumption of possession under s 37(d) or presumption of trafficking under s 37(da) of the Act. His Lordship must have been satisfied with the evidence of the prosecution on the element of knowledge and custody and control of the drugs* and the element of carrying, keeping and transporting the drugs from somewhere into Malaysia in coming to his decision that the prosecution has made out a prima facie case under s 39B of the Act.
>
> ...
>
> [11] *We failed to comprehend the learned trial judge's finding at the end of the defence on the presumption of trafficking when the presumption was not invoked by the learned trial judge at the end of the prosecution's case.* By applying s 37(da) at the end of the defence case, the learned trial judge was reversing his earlier finding of trafficking under s 2 of the Act. In so doing, it was our view that His Lordship has erred in his approach (see *Duis Akim & Ors v Public Prosecutor* [2014] 1 MLJ 49). (Emphasis added.)

[1545]A similar conclusion was arrived at by the Court of Appeal in the case of *Patmanathan a/l Logannathan v Public Prosecutor* [2016] MLJU 1668, where it was held that where a statutory presumption is not invoked by the trial court at

the close of prosecution, there is no burden to rebut the presumption by the accused:

> [33] It is clear that the trial judge found that the appellant did have custody and control, and knowledge of the drugs without resorting to the presumption under s 37(d) of the Act even though she did refer to it. Since Her Ladyship did not invoke s 37(d), the question of making a finding that the appellant had rebutted the presumption does not arise. We have also considered the evidence that the appellant had attempted to evade arrest. This conduct further supports the irresistible inference of knowledge of the drugs.

[1546]Consistently there are several case authorities that held that it is a misdirection in law for a trial court to invoke a statutory presumption and at the same time make a finding of fact which is the very subject of the presumption. In *Haryadi bin Dadeh v Public Prosecutor* [2000] 4 MLJ 71 the trial court had had made findings on the existence of actual possession of drugs by the accused and thereafter had also applied the statutory presumption to presume 'possession'. The Federal Court held as follows:

> He then went on to say that likewise because the accused was in possession of more than 200g of cannabis, the presumption of trafficking under s 37(da)(vi) of the Act applied. Towards the conclusion of his judgment, the learned trial judge said, inter alia, that the appellant had failed to rebut the statutory presumptions under s 37(d) of the Act (presumed possession) and s 37(da)(vi) (presumed trafficking) of the Act. By making a finding of possession and then relying on the provision of presumed possession under s 37(d) of the Act, the learned trial judge had seriously misdirected himself and leaves us in serious doubt as to whether he was making a finding of actual possession or was relying on presumed possession under s 37(d) of the Act. The benefit of doubt ought in our view, be given to the appellant.

[1547]The same result obtained in another Federal Court decision, again on the application of the presumption of possession under the Dangerous Drugs Act 1952, in the case of *Emmanuel Yaw Teiku v Public Prosecutor* [2006] 5 MLJ 209where it was plainly ruled:

> Our observation of the above judgement makes it clear that where there was evidence of actual possession, the trial judge should make a positive finding that there was actual possession of the drug by the accused person and he should not invoke the presumption under s 37(d) of the Act. If a trial judge invoke s 37(d) of the Act to establish possession even though there was evidence of actual possession and went on to invoke s 37(da) to establish trafficking, it would be a serious misdirection.

[1548]In *Mohamad Hanafi bin Mohamad Hashim lwn Pendakwa Raya* [2016] 3 MLJ 723, the Court of Appeal held that it was incumbent on the trial court at the close of prosecution to make an election as to whether to make findings of fact or alternatively invoke a statutory presumption. The purpose for such an

election was to afford the accused a clear notice on what burden is cast upon him in the defence case — whether to merely raise a reasonable doubt on the prosecution case or to rebut the presumption on a balance of probabilities. It was thus ruled:

> [18] Mahkamah ini dalam kes-kes terdahulu telah dengan jelas memutuskan bahawa dalam situasi dan keadaan yang serupa di mana hakim bicara bergantung kepada keterangan langsung dan secara alternatif telah mengguna pakai anggapan di bawah ADB, adalah sesuatu yang tidak wajar. Dengan berbuat demikian, perayu telah diprejudiskan dari segi beban untuk mengemukakan keterangan (*evidential burden*) sama ada untuk mengemukakan keterangan bagi menimbulkan keraguan yang munasabah terhadap kes 'prima facie' pihak pendakwaan ataupun mengemukakan keterangan untuk mematahkan anggapan atas imbangan kebarangkalian seperti yang telah diputuskan dalam kes *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89.

[1549]A similar result can be readily seen in the case of *Codjo Theodore Tchidi lwn Pendakwa Raya* [2018] MLJU 49 in which the Court of Appeal ruled that there was no error in the decision of the trial court, where at the close of prosecution case,and instead of applying the statutory presumption, made a prima facie finding of fact on the existence of 'trafficking' and ultimately at the end of the case held that the defence had failed to raise reasonable doubt on the said finding of fact:

> [17] Peguambela terpelajar berhujah bahawa hakim bicara pada akhir kes pendakwaan tidak menyatakan dengan jelas sama ada kes terhadap perayu diasaskan kepada pengedaran langsung dadah atau diasaskan kepada peruntukan anggapan pengedaran. Peguambela terpelajar seterusnya berhujah, berdasarkan kepada alasan penghakiman di akhir kes pendakwaan, hakim bicara telah mendapati perayu mengedar dadah dalam maksud s 2 ADB 1952. Peguambela terpelajar selanjutnya berhujah, semasa menimbang kes pembelaan, hakim bicara telah menggunapakai peruntukan anggapan pengedaran di bawah s 37(da) ADB 1952. Justeru itu, peguambela terpelajar berhujah dapatan dan keputusan oleh hakim bicara tersebut menimbulkan kesamaran dan ketidaktentuan apabila menggunapakai kedua-dua peruntukan undang-undang terhadap perayu, iaitu pengedaran secara langsung dan anggapan pengedaran, dan yang demikian telah menyalaharahkan dirinya di sisi undang-undang. Peguambela terpelajar berhujah di atas kesilapan tersebut, sabitan terhadap perayu tidak boleh dikekalkan. Peguambela terpelajar merujuk kepada kes- kes *Seyedalireza Seyedhedayatollah Ehteshhamiardestani v Public Prosecutor* [2014] 4 CLJ 406, *Mohamad Hanafi bin Mohamad Hashim v Pendakwa Raya* [2016] 3 MLJ 723, *Nguyen Quoc Tuan v Public Prosecutor* [2016] 6 MLJ 156, *Soorya Kumar Narayanan v PP* [2009] 6 CLJ 257, dalam menyokong hujahannya.
>
> [18] Mahkamah ini mendapati hujahan oleh peguam terpelajar bagi pihak perayu dalam isu ini tidak mempunyai merit. Di akhir kes pendakwaan, Hakim Bicara dengan jelas membuat dapatan dan memutuskan bahawa perbuatan perayu membawa dadah yang menjadi perkara pertuduhan adalah terjumlah kepada perbuatan pengedaran sebagaimana maksud s 2 ADB 1952 (ms 19 rekod rayuan Jld

1). Dapatan dan keputusan hakim bicara di akhir kes pendakwaan, jelas melihatkan bahawa hakim bicara membuat dapatan bahawa pihak pendakwaan telah berjaya membuktikan bahawa perayu telah melakukan perbuatan mengedar dadah berbahaya seperti yang ditakrifkan di bawah s 2 ADB 1952, iaitu membawa (*carrying*) (ms 21 rekod rayuan Jld 1).

[19] Justeru, beban pembelaan diri oleh perayu hanya untuk mengemukakan keraguan yang munasabah terhadap kes pendakwaan (*Mat v Public Prosecutor* [1963] MLJ 263; [1963] 1 LNS 82, *PP v Saimin* [1971] 2 MLJ 16).

[20] Di akhir kes pembelaan, hakim bicara mengulangi lagi bahawa perbuatan perayu membawa dadah di dalam P14A dan P14C dalam bagasi P12 adalah terjumlah kepada pengedaran secara langsung seperti yang ditakrifkan di bawah s 2 ADB 1952 (ms 34 rekod rayuan Jld 1). Hakim bicara mendapati perayu telah gagal menimbulkan sebarang keraguan yang munasabah terhadap kes pendakwaan (ms 35 rekod rayuan Jld 1). Jelasnya, hakim bicara tidak meletakkan beban pembuktian yang lebih tinggi terhadap perayu. Mahkamah ini berpendapat walau pun hakim bicara ada merujuk kepada peruntukan s 37(da)(xvi) ADB 1952 semasa menimbangkan kes pembelaan perayu, tetapi hakim bicara tidak menjadikan peruntukan anggapan pengedaran tersebut sebagai asas sabitan terhadap perayu (ms 34 rekod rayuan Jld 1). Beban pembelaan masih kekal pada tahap menimbulkan keraguan yang munasabah ke atas kes pendakwaan, iaitu pada tahap di bawah daripada atas imbangan kebarangkalian (*balance of probabilities*) sekiranya peruntukan anggapan pengedaran digunapakai (lihat *PP v Ku Yahya Ku Bahari & Anor* [2002] 1 CLJ 113). Justeru itu, perayu telah tidak diprejudiskan dalam isu beban pembuktian pembelaan dan tiada sebarang ketidakadilan yang menjurus kepada 'miscarriage of justice'.

[1550]In *Seyedalireza Seyedhedayatollah Ehteshamiardestani v Public Prosecutor* [2014] 6 MLJ 408, on the same issue, the Court of Appeal made it clear that the trial judge ought to make the necessary finding as to whether it was actual or presumed possession and whether it was presumed or actual trafficking based on the evidence before the court, in light of the importance of the finding on the nature of the burden placed on the defence.

[1551]In any event, it is not wrong for the court to evaluate, for completeness, the evidence in ascertaining whether actual fact can be proved or that the presumption should instead apply, at time reflecting the overwhelming evidence available against the accused. The true thrust of the findings ought to be ascertained, and regard be had if the accused was in the process prejudiced. Thus the following passages from the decision of the Court of Appeal in *Jorge Crespo Gomez v Public Prosecutor* [2018] MLJU 932 are especially instructive:

[36] Learned counsel also submitted that the learned trial judge had failed to give clear indication under which presumption he had applied, if any, to find that a prima facie case had been made out against the appellant and had equally failed to make a positive finding as to which presumption he had invoked. Even though the learned trial judge had alluded to the applicability of both the presumptions of

possession and trafficking under ss 37(d) and 37(da) of the DDA, nevertheless the learned trial judge had considered the applicability of both the presumptions only in the alternative and does not make a definite finding on which of the presumptions that has been invoked/elected.

[37] Learned counsel further submitted that the aforesaid approach by the learned trial judge is wrong in law and that it is trite that presumptions cannot be invoked in the alternative. Further, the lack of a definitive finding on the presumption invoked is prejudicial to the appellant as the appellant has to rebut both presumptions resulting in a legal burden being imposed on the appellant to rebut such presumptions on the balance of probabilities which, from the defence point of view, is heavier than the burden of casting a reasonable doubt and if the appellant fails to discharge the said legal burden, he will be convicted, even where a reasonable doubt as to his guilt exists. Effectively it would create a situation akin to where double presumption have been invoked. The appellant would have to produce sufficient evidence to prove on the balance of probabilities that he does not have possession and knowledge of the drugs and was not trafficking in the drugs. Hence, it was finally submitted that the learned trial judge had committed a misdirection by way of non-direction rendering the appellant's conviction unsafe. Learned counsel relied on *Seyedalireza Seyedhedayatollah Ehtestamiardestani v PP* [2014] 6 MLJ 408 and *Mohamad Hanafi bin Mohamad Hashim v PR* [2016] 3 MLJ 723, to fortify his submissions.

[38] There can be no doubt that there were alternative findings made by the learned judge in respect of the application of the presumptions relating to possession and trafficking vis a vis mens rea (direct) possession and direct trafficking.

[39] *However, having scrutinized the learned trial judge's grounds of judgment in its entirety, we opined that the learned trial judge had indeed found that the prosecution had proved that the appellant was having mens rea possession of the said drugs* (as stated in his grounds of judgment in para 24, p 19 *Jld* 1, *RR*) *and had trafficked in the said drugs by virtue of the invocation of the presumption of trafficking under s 37(da)(ix) of the DDA* in view of the weight of the said drugs in his possession (as stated in para 26 of the same *Jld*).

...

[42] *In our view the above said finding is the main thrust of the learned trial judge's finding in respect of possession of the said drugs.* Equally the invocation of the presumption of trafficking under s 37(da)(ix) of the DDA is the main thrust of the learned trial judge's finding in respect of the element of trafficking in the said drugs based upon the fact that the learned trial judge had taken into account the amount of drugs in the possession of the appellant which exceeded the statutory limit of 40g as proscribed by the said section.

[43] *We further surmised that it was only for the sake of completeness that the learned judge had ventured to discuss the alternative findings of the application of both the presumptions of possession and trafficking*, which we think is completely unnecessary, bordering on verbosity.

...

[45] *It is perfectly allowable under the law for the learned trial judge to analyse all the alternatives available to him to determine the manner in which both the elements of possession and trafficking in the said drugs are proven. What can be gauge from the discussions raised by the learned trial judge only goes to show that the facts and evidence stacked against the appellant is very strong and overwhelming* and that the prosecution would have, anyway, make out a prima facie case of trafficking against the appellant, which ever approach is adopted. The learned trial judge did not at any time breach the rule against double presumptions by taking into consideration the various alternatives available to him in determining the manner in which the twin elements of possession and trafficking in the said drugs are proven. *No one is confused or prejudiced as in the final analysis the learned trial judge, as here, had only made one finding relating to possession of the said drugs*, to wit, the appellant was found to have mens rea possession of the said drugs and presumed to have been trafficking in the said drugs under s 37(da)(ix) of the DDA on account of the weight/amount of the said drugs found in his possession. (Emphasis added.)

[1552]I also agree that given such a long line of authorities on the subject, albeit mainly on the presumptions of possession and trafficking under the Dangerous Drugs Act 1952, it is not accurate to maintain that the application of the presumption is mandatory.

[1553]First, even though the prosecution alludes to s 4 of the Evidence Act 1950 to contend on the mandatory nature of the application of a presumption, that provision only deals with presumptions under the Evidence Act 1950. Not the Dangerous Drugs Act 1952, the MACC Act or the Penal Code. Section 4(2) of the Evidence Act 1950 plainly reads:

4 Presumption

...

(2) Whenever it is directed by this Act that the court shall presume a fact, it shall regard the facts as proved unless and until it is disproved.

[1554]Secondly, subsequent appellate decisions have sought to clarify the true position of the earlier judgment of the Federal Court in the case of *Public Prosecutor v Zulkifli bin Arshad* [2011] 1 MLJ 599 which is relied on by the prosecution to support the proposition that the invocation of the statutory presumption is mandatory given the presence of the word 'shall' in the relevant provisions, such as in ss 23(2) and 50 of the MACC Act. In that case, the Federal Court held that once mens rea actual possession was found in evidence (as opposed to a presumption of possession), considering the weight of the drugs, the presumption of trafficking under s 37(da)(vi) of the Dangerous Drugs Act 1952 must be invoked. The presumption of trafficking only becomes mandatory upon a finding of fact of actual possession. There is no ruling that the presumption of possession should have been invoked as well, despite the word, 'shall' in s 37(d) of the Act. There are no findings of fact made

on the same facts to be presumed and neither was the accused confronted with conflicting burdens.

[1555]This true position on the application of the presumption of trafficking was recently affirmed by the Court of Appeal in *Low Kai Gie v Public Prosecutor* [2020] 1 MLJ 476 where it was usefully clarified in the following fashion:

> [5] The learned judge was right in invoking the presumption, which shifted the legal burden to the appellant to prove that the drug was not for the purpose of trafficking rather than for the prosecution to prove that the drug was for the purpose of trafficking. In fact, once the learned judge found that mens rea possession had been established by the prosecution, he must invoke the presumption: see *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273; [1998] 2 CLJ 70 (FC); *Public Prosecutor v Zulkifli bin Arshad* [2011] 1 MLJ 599; [2010] 6 CLJ 121 (FC); *Attan bin Abdul Gani v Public Prosecutor* [1970] 2 MLJ 143b (HC).
>
> [6] *Where the statutory presumption of trafficking under* s 37(da) has been triggered by proof of actual possession (as opposed to presumed possession), there is absolutely no necessity for the court to invoke the presumption of possession and knowledge under s 37(d). There is no such necessity simply because actual evidence of possession and knowledge, the two factual elements presumed by s 37(d) upon proof of custody or control, must already have been established by the prosecution for the presumption under s 37(da) to be applicable. The presumption under s 37(da) *cannot be invoked without proof of mens rea possession*.
>
> [7] What is prohibited by *Muhammed bin Hassan* is for the court to use the presumption of possession and knowledge under s 37(d) to further invoke the presumption of trafficking under s 37(da), hence the rule against double presumption or presumption upon presumption. *Proof of 'possession' for the purpose of* s 37(da) must be established by actual evidence direct or circumstantial and not by presumed possession and knowledge under s 37(d).
>
> ...
>
> [9] *In the context of a criminal proceeding under* s 39B(1)(a) of the DDA, once it is proved that the accused was in mens rea possession of the drug, it is obligatory on the part of the court to raise the presumption of trafficking under s 37(da). Obligatory means compulsory: see the *Concise Oxford English Dictionary* (11th Ed, Revised).
>
> [10] The quantum of proof required to discharge the burden is proof on the balance of probabilities, which is heavier than the evidential burden of merely to cast a reasonable doubt in the prosecution's case. Failure to discharge the burden must result in a conviction: *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89; [1968] 1 LNS 116.
>
> [11] In order to succeed in this appeal, the appellant must show that the learned trial judge was plainly wrong in either of the following findings of fact:
>
> (a) that the appellant had knowledge of the drug; or

(b) that the appellant failed to rebut the presumption of trafficking under s 37(da)(xvi) of the DDA.

...

[23] Be that as it may, the appellant would still be entitled to an acquittal if he succeeded in raising a real and reasonable doubt in the court's mind as to whether or not the drug was in his physical possession at the time of his arrest. It is the lighter evidential burden of merely to introduce evidence which does not require proof on the balance of probabilities, unlike the requirement to rebut the presumption under s 37(da) of the DDA'.

[1556]More directly, the Federal Court in *Mohd Khir bin Toyo v Public Prosecutor* [2015] 5 MLJ 429 considered *Public Prosecutor v Zulkifli bin Arshad* [2011] 1 MLJ 599 but concluded that where a statutory presumption was not invoked at the close of prosecution's case and the accused defended the case without being put on notice of the higher burden of proof, the statutory presumption should not be invoked thereafter in the interest of fair play. In the words of Jeffrey Tan FCJ:

[107] But as luck would have it, s 42(3) of the ACA 1997 was not invoked by the courts below.

[108] In *Public Prosecutor v Zulkifli bin Arshad* [2011] 1 MLJ 599, it was held by the Federal Court per Hashim Yusoff FCJ, delivering the judgment of the Court, that where courts below failed to invoke presumptions, it is incumbent upon the Federal Court to do so:

...

[110] Nevertheless, the appellant had defended the case without the trial court's invocation of the presumption. To invoke the presumption now would place the appellant with a heavier burden, whereas, when his defence was called, he had only an evidential burden to cast a reasonable doubt.

...

[113] Given that heavier burden, any invocation of the presumption now would put the appellant at a clear disadvantage. It would be different had the courts below refused to invoke the presumption, in which case, the Federal Court would step in. But the presumption had not been relied by the prosecution, and the appellant would not have prepared his defence accordingly. Any invocation of the presumption now would not seem fair. The presumption should not be invoked in the interest of fair play ...

[1557]In my judgment, in the final analysis, the law on the application of presumptions in this country must now defer to the landmark decision of the Federal Court in *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1 where anine-member bench of the Federal Court ruled that s 37A of the Dangerous Drugs Act 1952, which permitted the use of more than

A one presumption in the prosecution of an offence to be unconstitutional. One of the central findings is the manner in which a statutory presumption ought to be applied, with overriding consideration being that of the principle of proportionality.

B **[1558]**An extensive review of the relevant laws in other jurisdictions in the Commonwealth was undertaken, and the summary of the important rules of proportionality which are now applicable in the consideration of whether a statutory presumption ought to be invoked, is found in the following passages in the judgment of Richard Malanjum Chief Justice:

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> [121] The United Kingdom position based on the leading cases of *R v Lambert* [2001] UKHL 37, *R v Johnstone* [2003] UKHL 28, and *Sheldrake v Director of Public Prosecutions; Attorney General's Reference (No 4 of 2002)* [2005] 1 All ER 237 was helpfully distilled in *Gan Boon Aun* at para 46 as thus:
>
> D
>
> (a) presumptions of fact or of law operate in every legal system;
>
> (b) it is open to states to define the constituent elements of an offence, even to exclude the requirement of mens rea;
>
> (c) when a section is silent as to mens rea, there is a presumption that mens rea E is an essential ingredient: The more serious the crime, the less readily will that presumption be displaced;
>
> (d) the overriding concern is that a trial should be fair: The presumption of innocence is a fundamental right directed to that end;
>
> F (e) there is no prohibition against presumptions in principle, but the principle of proportionality.
>
> [122] The doctrine of proportionality was likewise implicit in the Hong Kong approach to statutory presumptions in criminal law. Referring to statutory exceptions to the presumption of innocence, the Privy Council explained in *Lee Kwong-Kut* G at pp 969–970:
>
> Some exceptions will be justifiable, others will not. Whether they are justifiable will in the end depend upon whether it remains primarily the responsibility of the prosecution to prove the guilt of an accused to the required standard and whether the exception is reasonably imposed, notwithstanding the importance H of maintaining the principle which article 11(1) enshrines. *The less significant the departure from the normal principle, the simpler it will be to justify an exception. If the prosecution retains responsibility for proving the essential ingredients of the offence, the less likely it is that an exception will be regarded as unacceptable. In deciding what are the essential ingredients, the language of the relevant statutory* I *provision will be important.* However what will be decisive will be the substance and reality of thelanguage creating the offence rather than its form. If the exception requires certain matters to be presumed until the contrary is shown, then it will be difficult to justify that presumption unless, as was pointed out by the *United States Supreme Court in Leary v United States* (1969) 23 LEd 2d 57, 82, 'it can at least be said with substantial assurance that the presumed fact is

more likely than not to flow from the proved fact on which it is made to depend'. (Emphasis added.)

[123] Useful guidance can also be gleaned from the case of *R v Oakes*. The Canadian Supreme Court held that, in general, 'a provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question, violates the presumption of innocence', at para 57. The fact that the standard required to disprove the presumed fact is only on the balance of probabilities does not render the reverse onus clause constitutional, at para 58.

[124] Be that as it may, a provision which violates the presumption of innocence may still be upheld if it is a reasonable limit, prescribed by law and demonstrably justified in a free and democratic society. In this exercise, the Canadian Supreme Court in *R v Oakes* elaborated on the two central criteria that must be satisfied, at paras 69–70:

(a) the objective must be of sufficient importance to warrant overriding a constitutionally protected right. The objective must relate to pressing and substantial concerns; and

(b) the means chosen to achieve the objective must be reasonable and demonstrably justified, in that:

(i) the measure must be rationally connected to the objective;

(ii) the right in question must be impaired as little as possible; and

(iii) the effect of the measure must be proportionate to the objective.

[125] It is clear therefore from the local and foreign authorities above that the presumption of innocence is by no means absolute. However, as discussed above, derogations or limits to the prosecution's duty to prove an accused's guilt beyond a reasonable doubt are carefully circumscribed by reference to some form of proportionality test. We consider that the application of the proportionality test in this context strikes the appropriate balance between the competing interests of an accused and the state (see *Gan Boon Aun*).

[126] It is notable that the doctrine of proportionality and the all-pervading nature of art 8 form part of the common law of Malaysia, developed by our courts based on a prismatic interpretation of the FC without recourse to case law relating to the European Convention of Human Rights. As such we are therefore of the view that the appellants' assertion that art 5 confers an absoluteright upon an accused to be presumed innocent until proven guilty and not subject to the doctrine of proportionality while disregarding art 8, is unsupported by authority and without basis.

[27] *To summarise, the following principles may be discerned from the above authorities*:

(a) *art 5(1) embodies the presumption of innocence, which places upon the prosecution a duty to prove the guilt of the accused beyond a reasonable doubt*;

(b) *the presumption of innocence is not absolute. A balance must be struck between the public interest and the right of an accused — art 8(1)*;

(c) *a statutory presumption in a criminal law, which places upon an accused the burden of disproving a presumed fact, must satisfy the test of proportionality under art 8(1). The substance and effect of the presumption must be reasonable and not greater than necessary*;

(d) *the test of proportionality comprises three stages*:

(i) *there must be a sufficiently important objective to justify in limiting the right in question*;

(ii) *the measure designed must have a rational nexus with the objective; and*

(iii) *the measure used which infringes the right asserted must be proportionate to the objective*;

(e) *factors relevant to the proportionality assessment include, but are not limited to, the following*:

(i) *whether the presumption relates to an essential or important ingredient of the offence*;

(ii) *opportunity for rebuttal and the standard required to disprove the presumption; and*

(iii) *the difficulty for the prosecution to prove the presumed fact*;

(f) *a significant departure from the presumption of innocence would call for a more onerous justification*. (Emphasis added.)

[1559]Given this decision, notwithstanding the use of the word 'shall' the court retains the discretion to decide whether or not to invoke any statutory presumption, and for that purpose consider the proportionality of applying such a presumption such that in the event that an overlap exists between facts presumed and facts found, the presumption ought not to be triggered by the court because 'the substance and effect of the presumption' would arguably no longer be 'necessary' given the absence of difficulty in the prosecution actually proving the facts otherwise intended to be presumed.

[1560]I am of the view that statutory presumptions should be applied for the purpose they are enacted. Which is to address the unfairness prevailing from the near impossibility of demonstrating a relevant fact. Presumptions do away with the need to prove certain facts and infer the existence of one fact from the existence of some other and provides that fact as proved which result in an accused to put forth evidence to rebut or negate that fact on a balance of probabilities.

[1561]The decision of the trial court to invoke such a presumption must therefore be accompanied by a clear notification made to the accused that the presumption has been invoked against him when the accused is called to enter his defence. A failure to do so does not serve to promote a fair trial and means

that the accused would to his prejudice not know what would be the standard of proof placed on him to defend the case. Either to rebut on a balance of probabilities should a presumption be invoked, or merely to cast a reasonable doubt on the prosecution case.

[1562]In this case, at the close of prosecution, given the available evidence, I had earlier decided not to trigger the application of the presumption under s 50 of the MACC Act. That is why I made absolutely no mention of the presumption in the summary of my key findings. I agree with the defence that it is therefore not applicable.

The relationship between ss 23 and 50 of the MACC Act

[1563]It is also essential to appreciate the relationship and interplay between s 23(1) of the MACC Act and s 50 of the same Act. An offence under s 23 of the MACC Act is not one which completes on proof of gratification being received. The cases referred to by the prosecution mainly concern presumptions in offences that require proof of receipt of gratification. Section 23(1) however is the crime of using one's position to obtain a gratification. The completeness of the offence, as correctly submitted by the defence, does not depend on the receipt of a gratification. What must be shown however, is that the using of the position, in this case the participation at the Cabinet meetings was to obtain gratification. The fact that there was receipt of gratification is nevertheless relevant to the charge and fortifies the prosecution case.

[1564]It is therefore strictly unnecessary to prove actual receipt of gratification since s 23(1) only requires proof of use of position for gratification which for that purpose permits reliance on a presumption under s 23(2). And the application of s 23(2) means that upon proof of the accused's involvement in a matter that he has an interest in, the accused is presumed to have used his position for gratification. It then falls on the defence to rebut the presumption on a balance of probabilities, which I have ruled the defence has not succeeded.

[1565]In such situation, any application of s 50 of the MACC Act to achieve the presumption of corrupt intention serves only to confound the question on the standard of proof imposed on the accused to mount an effective defence. Furthermore, for the purposes of the s 23(1) offence, the criminal intention is already supplied by the failure of an accused to prevent himself from participating in the impugned conduct which involves his own private interest.

[1566]Now, after having found that the defence has failed to rebut the presumption under s 23(2) on a balance of probabilities, in any event, even if what the defence needed to do to earn an acquittal from this charge was only to cast a reasonable doubt on the case of the prosecution, on the totality of the

A evidence in this case, I find that the defence has not succeeded to achieve even that.

The 'pathology of corruption'

B **[1567]**In his closing submissions, the learned lead senior counsel advanced the argument that the allegation made against the accused in the charge under s 23 of the MACC Act involves facts which do not demonstrate the pathology of corruption. By this I understand him to mean the generally understood cause and effects of corruption. I would prefer to describe this as the anatomy of C corruption instead. Thus, it is contended that for the accused who is accused of having used his office for gratification by participating in the Cabinet meetings in 2011 and 2012 which led to the financing by KWAP to SRC of RM4 billion to have only received the RM42m some three and a half years after the meetings is so unlike the usual cases of bribery. D

[1568]The lead senior counsel suggested that in the usual cases, the gratification would be granted in advance, or that once the RM4 billion had been channelled out of the country, there was no rational reason for the accused E to have accepted the RM42m in his own personal account in Malaysia. No evidence was led that he had an overseas accounts, and it is outlandish to suggest that a sitting Prime Minister would blatantly put in his personal account RM42m said to be derived from the funds borrowed by SRC from KWAP. F

[1569]This is but a sweeping generalisation of the crime of corruption and bribery, peppered with conjectures and suppositions on the facts of the case. What matters to this court however is the offence with which the accused is charged, in this case under s 23 of the MACC Act. And whether there is G sufficient evidence to satisfy the elements of the offence for the charge to be proved beyond reasonable doubt.

[1570]As to whether it is outlandish to suggest that a sitting Prime Minister H would blatantly put in his personal account RM42m funds borrowed by SRC from KWAP, it cannot be conveniently ignored that the powers of the Prime Minister are vast, broad and unparalled. It is also an undeniable fact that the change of the attorney general (which resulted in the appointment of DW14) in a process which under art 145(1) of the Federal Constitution must have I involved the Prime Minister occurred in the same month of July 2015 when the *Wall Street Journal* and *Sarawak Report* published their reports. Article 145(3) of the Federal Constitution vests in the attorney general and no other, the discretionary power to institute, conduct or discontinue any proceedings for any offence in this country.

[1571]I have also earlier already referred to the case of *Mohamed Ramly bin Haji Rasip v Public Prosecutor* [1941] 1 MLJ 31 which establishes that it is still an offence if the gratification is received after a lapse of time from the time the corrupt act is committed. I have also stressed that to hold otherwise would violate the legal position and constitutes a departure from basic logic and common sense. This is because potential violators could flagrantly abuse their office and conveniently delay the receipt of the gratification to a later point in time as a design to escape criminal liability altogether. This authority of *Mohamed Ramly bin Haji Rasip v Public Prosecutor* [1941] 1 MLJ 31 also stands for the proposition that a series of acts that are separated by intervals of time may nevertheless be construed to form one transaction if they were connected with a single criminal intent for the furtherance of a continuous plot.

[1572]The lead senior counsel again repeated the related argument raised at the end of the prosecution stage that the prosecution failed to prove the nexus between the gratification of the RM42m deposited into the personal accounts of the accused and the decision to grant the two government guarantees which he participated in, relying on the High Court decision in *Thomas Kandadi* which stands for the proposition that to prove an offence under s 15(1), the evidence must show that the accused's intention when he undertakes the impugned conduct is to obtain a gratification.

[1573]I have explained why that case is to be distinguished especially by reason of the fact that the accused in that case had no interest in the participating firm. This made it imperative for the prosecution to prove that when the accused exercised his official authority in question, he did it with the intention of obtaining the gratification that he was charged with. In contrast, in the instant case, the accused had an overarching and controlling interest in SRC.

[1574]More importantly when the accused attended the Cabinet meetings which approved the two government guarantees his decision not to declare his interest and participation provided the mental element of the offence, and in any event, even if it is true that the accused could not have envisaged that the exact sum of RM42m would be credited into his accounts more than three years later, the said sum was indisputably within his contemplation of obtaining gratification in terms of advantage and monies, when he participated in the said meetings.

[1575]In other words, given his controlling position, the approval of the government guarantees (at the meetings which he attended) which enabled the approval of the financing of the RM4 billion meant that the accused would have at his disposal by virtue of the exercise of his controlling authority, funds of SRC which could at any time after the formalisation of the approval by the

Cabinet, be channelled into his personal accounts if and when necessary. And RM42m did enter his Accounts 880 and 906 in December 2014 and February 2015.

[1576]It is thus incorrect for the defence to argue that it seemed odd that the accused only obtained gratification more than three years after the corrupt act, or that in this case there was delayed gratification. This assertion is flawed. The accused had control over when he wished the gratification to be realised, from the time the financing was drawn down following the issuance of the guarantees approved at the said Cabinet meetings. It is the immediate entitlement to the gratification that matters under s 23 of the MACC Act, which was exactly the situation here.

[1577]This is not a case like the many contemplated by the defence in its 'pathology of corruption' narrative painted by the learned lead senior counsel where the accused public officer helps approve an application put in by a company in which he has an interest. The defence said that approval in that situation may be said to result in an instant gratification as the approval has been given to a company in which the public officer has an interest. Here, so the defence argued, the gratification was not immediate but very much delayed.

[1578]This line or reasoning is fallacious. The gratification is equally immediate and instant in this case. The accused, as a public officer participated in the Cabinet meetings which approved the guarantees, thus enabling the financing to be extended to SRC. The approvals meant that SRC, the company the accused had an interest in had secured an immediate benefit. This also means that from that time of the Cabinet meetings, the accused as the person with the ultimate and overall control of SRC was already immediately entitled to the gratification which he could decide when to have it realised.

[1579]Significantly this is also well within the scope of s 23(1) of the MACC Act, which proscribes a public officer from using his office for gratification.

[1580]As such, the decision of the Cabinet approving the government guarantees for the financing by KWAP to SRC would certainly benefit the accused as the true controller of the company, a vehicle which he controlled and used for his personal advantage. It therefore absolutely served the interest of the accused that SRC secured that massive financing from KWAP. As I have discussed at the end of the prosecution case, neither did the accused take any steps to return the RM42m after being apprised of its origin in SRC (as if the accused did not already know) in July 2015 or after the attorney general made the announcement on 26 January 2016 which cleared him of any criminal wrongdoing (because the accused was determined not to have known the

RM42m was from SRC at the material time). This does not seem consistent with the conduct of one who genuinely did not know of the source of the funds that one had already readily spent on.

CONCLUSION

[1581]The defence has not succeeded in rebutting the presumption under s 23(2) of the MACC Act on a balance of probabilities or in raising a reasonable doubt in the prosecution case in respect of this charge against the accused under s 23(1) of the MACC Act. I find the charge against the accused for using his position for gratification has been proved beyond reasonable doubt.

The three criminal breach of trust charges

The accused was not involved in the RM42m transactions and the cause and purpose of the same cannot be determined

[1582]The first contention of the accused is that he had never instructed any director of SRC including Nik Faisal, and had no involvement on transactions relating to funds of SRC being transferred out of SRC and into his accounts in December 2014 and February 2015 including the RM42m transactions specified in the charges.

[1583]The defence submitted that the evidence established that vis a vis the 'cause' and 'purpose' of the RM42m being transacted out of SRC and into the accounts of the accused in December 2014 and February 2015:

(a) the RM42m has not been proved to be funds belonging to SRC. The RM4 billion from the KWAP financing was completely disbursed out and no evidence is led on the subsequent transactions. The evidence reveals that the RM42m was credited into SRC's account from unknown sources prior to the debit transactions on 24 December 2014, 5 February 2015 and 6 February 2015;

(b) the actual or probable cause of the RM42m transactions is indeterminate and the evidence supports the drawing of multiple inferences on the same;

(c) the alleged involvement of Nik Faisal and PW42 in the transactions is also inconclusive given PW42's testimony which is consistent with evidence as led in the defence case that the transactions were carried out outside the mandated mode of operations through emailed soft copy instruction letters by third parties and the signatures thereon were probably forged;

(d) the evidence is capable of establishing that the same modus operandi which led to over RM290m funds in SRC's account being disbursed out

were transactions carried out at Jho Low's behest and for his own interests, benefit and agenda. This includes the RM42m transactions;

(e) a clear favourable inference which is reasonably drawn from the evidence is that the accused did not cause the RM42m to be transacted out of SRC and into his accounts and that he was not involved in the said transactions and the events which took place were outside his knowledge; and

(f) there is sufficient evidence to establish that the RM42m transactions were related to the commission of CBT jointly by Nik Faisal, Jho Low and other persons pursuant to an offence under s 409 read with s 34 of the Penal Code without any involvement of the accused. This was also the conclusions reached by the MACC in June 2018 from its investigations.

[1584]Given the pivotal aspect of the transactions of the said SRC's RM42m, it is imperative the same be summarised again as follows:

The RM32m in December 2014

(a) on 24 December 2014:

(i) RM40m from SRC's account was transferred into GMSB's account vide an emailed instruction letter dated 24 December 2014 (P258); and

(ii) the same RM40m was immediately thereafter transferred from GMSB's account to IPSB vide an emailed instruction letter dated 24 December 2014 (P267B);

(b) on 26 December 2014:

(i) RM27m out of the said RM40m was transferred from IPSB to Account 880 vide a RENTAS Form dated 26 December 2014 (P402); and

(ii) RM5m out of the said RM40m was transferred from IPSB to Account 906 vide a RENTAS Form dated 26 December 2014 (P403).

The RM10m in February 2015

(c) on 5 February 2015:

(i) RM5m from SRC was transferred to the GMSB vide a soft copy instruction letter dated 5 February 2015 (P262B); and

(ii) the RM5m was immediately transferred from GMSB to IPSB vide a soft copy instruction letter dated 5 February 2015 (P268);

(d) on 6 February 2015:

(i) a further RM5m from SRC was transferred to GMSB vide a soft copy instruction letter dated 6 February 2015 (P264B); and

(ii) the RM5m was immediately transferred from the GMSB to IPSB vide a soft copy instruction letter dated 6 February 2015 (P269A);

(e) on 10 February 2015:

(i) the RM10m was transferred from IPSB to the accused's Account 880 vide a RENTAS form dated 9 February 2015 (P404).

[1585]For proper context, I shall from the submissions made by the defence, set out in summary fashion, the key aspects of the testimony of the witnesses for the defence, to the extent they are pertinent to the transactions of the RM42m, in the following paragraphs.

The evidence of the accused (DW1)

[1586]The accused claimed to have no knowledge of the RM27m that was earlier channeled into Account 880 on 8 July 2014 from PBSB or the RM5m transferred to Account 906 on 10 September 2014 from PPC. The accused never had any dealings with the PPB Group and did not enter into any arrangement to advance funds from the PPB Group. These have been discussed at length at the end of the prosecution case.

[1587]The subsequent transactions of RM32m on 24 December 2014 from SRC to GMSB, then to IPSB on 24 December 2014 and thereafter to Accounts 880 and 906 on 26 December 2014 were all done without his knowledge or involvement.

[1588]The transfer instructions of the RM32m to PBSB and PPC in P277 was not signed by the accused and was 'forged'. These transactions of 29 December 2014 were carried out without his knowledge or involvement.

[1589]The transactions of the RM5m on 5 February 2015 and RM5m on 6 February 2015 from SRC to GMSB to IPSB and thereafter from IPSB to the Account 880 on 10 February 2015 were done without his knowledge and involvement.

[1590]The accused did not approve of and had no knowledge of any appointment by SRC for CSR work to be undertaken by IPSB and any grant of RM250m in relation thereto;

[1591]The accused also did not instruct for any funds of SRC to be transacted for any CSR work. Nor did he have any knowledge of and involvement in the transactions of RM103m from SRC to IPSB vide GMSB and the cheque of

RM20m from SRC to IPSB. He did not instruct Nik Faisal or anyone else to carry out any of the transactions of funds from SRC to GMSB, IPSB or the PPB Group.

[1592]I find the assertion that the accused had no dealings with the PPB Group particularly with two of PPB's subsidiaries namely PBSB and PPC to be plainly untrue. Evidence in the form of money trail and bank records has shown the utilisation by the accused of the RM32m transferred in July and September 2014 by PBSB and PPC to Accounts 880 and 906 belonging to the accused. It is undisputed that the same amount of RM32m was later transferred as repayment to PBSB and PPC by the accused on 29 December 2014.

[1593]I have also earlier found that evidence demonstrates that the accused must have had knowledge of the transactions that resulted in the remittances of the RM42m from SRC through GMSB and IPSB into his personal accounts on 26 December 2014 and 10 February 2015. His immediate utilisation of the RM42m by the payment of RM32m back to PBSB and PPC on 29 December 2014 and the regularisation of his personal over-drawn accounts in respect of the remittance of RM10m is only one piece of evidence from which inference of knowledge on his part could be drawn.

[1594]In my view it is also immaterial whether or not the accused approved of any appointment by SRC for IPSB undertake CSR work, or that a grant of RM250m be given for that purpose, or for any funds of SRC to be transacted for any CSR work. I agree there is no evidence of this but in any event these considerations are quite removed from if not totally irrelevant to the charges against the accused.

[1595]The accused has also raised other issues which have relevance to the 'cause' and 'purpose' of the RM42m transactions that I will deal with at the end of this section after considering the evidence of other pertinent defence witnesses as appearing next.

The evidence of Krystle Yap (DW2)

[1596]Krystle Yap (DW2) was employed by AmBank at the material time. DW2, Joanna Yu (PW54) and Daniel Lee made up the team of relationship managers (led by PW54) assigned to the accounts of SRC, GMSB and the accused.

[1597]It is undisputed that funds from SRC and GMSB's accounts were transacted vide soft copy instruction letters which were emailed to the relationship managers in AmBank. Each of the soft copy letters appear to carry

the signatures of Nik Faisal and PW42. Out of 17 transactions adduced in evidence, only seven hard copies were provided to AmBank and the hard copies are not identical with the emailed instruction letters.

[1598]Further, out of these transactions:

(a) three emailed instruction letters were used to transfer RM170m from SRC to PPC in three transactions on 8 July 2014, 14 July 2014 and 8 August 2014;

(b) one emailed instruction letter was used to effect a transfer of RM20m from the SRC's Account 650 to the SRC's Account 736 on 12 December 2014 which was thereafter channeled from Account 736 to IPSB vide cheque No 563616 dated 15 December 2014 (D296);

(c) six emailed instruction letters were used to effect the transactions related to the RM42m transactions subject to the instant charges, from SRC to GMSB, and then from GMSB to IPSB on 24 December 2014, 5 February 2015 and 6 February 2015; and

(d) six emailed instruction letters were used to effect the transfer of a total of RM53m from SRC to GMSB, and then to IPSB on 9 January 2015, 13 February 2015 and 9 April 2015.

[1599]DW2 was examined on the transactions from SRC and GMSB, and confirmed among others that she had no dealings with either Nik Faisal or PW42 with regards to fund transactions of SRC and GMSB, and instead only dealt with See Yoke Peng (SRC's head of finance) or Terrence Geh from the beginning. Instructions from SRC and GMSB were through emails, phone calls or WhatsApp from See Yoke Peng and Terrence Geh directly to DW2 or through instructions of PW54 or Daniel Lee.

[1600]DW2 would then forward the emailed letters of instructions received by her to the JRC branch for processing, and that she cannot remember seeing any resolutions from SRC or GMSB or any letters from the directors, authorising See Yoke Peng or Terrence Geh to deal with the bank accounts and agreed that if this exists it should be in the file maintained by the AmBank JRC branch.

[1601]DW2 also testified that AmBank can only act on emailed instruction letters if there is instruction and indemnity letter in favour of the bank to act on such instructions. DW2 however cannot remember whether there is an Instruction & Indemnity letter from SRC or GMSB authorising transactions to be conducted electronically but if the same exists it should also be in the files maintained by the JRC Branch. She does not know if there was ever such a letter of indemnity and instruction from SRC. Hard copies of instruction

letters sent are sometimes received by her. She does not verify the same with the earlier emailed letters and only forwarded the same to the JRC Branch.

[1602]Nor was Krystle Yap (DW2) ever involved in any 'confirmation' process for any transactions in the SRC and GMSB accounts in 2014 and 2015. It was explained that even though notations on four instruction letters from SRC and GMSB (D297, D69A, D302B and D303) appear to suggest that DW2 confirmed the transactions, she did not confirm the same and cannot explain why her name was noted thereon.

[1603]In any event, although only seven emails by which soft copy instruction letters of SRC and GMSB were sent to the AmBank relationship managers were produced, DW2 nevertheless confirmed that all transactions of SRC and GMSB were carried out based on instruction letters which were emailed by either See Yoke Peng or Terrence Geh.

[1604]The defence submitted that the evidence of DW2shows that all the material transactions of funds from the SRC and GMSB accounts were executed through 'soft copy instruction letters' being emailed by See Yoke Peng or Terrence Geh to the relationship managers.

[1605]The defence thus raised the challenge that the bank had acted on the emailed soft copy instruction letters to effect the transactions even though no instruction and indemnity letter from SRC or GMSB appears in the files maintained by the JRC branch for the accounts of the two entities (P61, P62, P63 and P64).

[1606]Uma Devi (PW21), the manager for AmBank JRC branch, who had collated and adduced the records of the JRC branch for inter alia the SRC and GMSB accounts, confirmed that there was no 'Instruction & Indemnity Letter' in the JRC Branch records for both the SRC's Accounts 736 and 650. The JRC branch records in the form of folders for the SRC and GMSB accounts which were adduced also do not contain the same.

[1607]The defence also argued that PW39 in his testimony admitted that the board of directors of SRC had never authorised or mandated for the bank to act on soft copy or electronic instruction letters. Further, nor do the files maintained by JRC Branch for the accounts of SRC and GMSB (P61, P62, P63 and P64) contain any authorisation by the two entities for the bank to deal with Terrence Geh or See Yoke Peng in relations to transactions of funds including receiving instructions or providing confirmations.

[1608]The defence therefore challenged whether 'confirmations' on the SRC and the GMSB transactions were actually obtained and submitted that the notations on some of the emailed letters of instructions cannot therefore be relied on.

[1609]In my judgment, these facts, as elicited from DW2 do not add much to progress the case of the accused. The mandate of SRC and GMSB to transfer funds by using electronic copies of instruction letters is in my view an issue far quite removed from the charges, if not in truth a total non-issue.

[1610]In any event evidence demonstrates that PW39 and even the bank were of the understanding that SRC was authorised to give instructions to the AmBank by email or electronic means. Thus the directors' circular resolution (DCR) dated 23 August 2011 entitled 'General Authority for Bank Accounts' (D519) clearly carried mandate for the use of electronic copies of instruction letters to transact fund with the bank. This is confirmed by PW39 as recorded in the notes of proceedings on 12 June 2019 — PW39:

> S: But this DCR contains this condition of signature whereby the bank which this DCR is given is able to accept instruction of signature by way of facsimile electronic signature with regard to the orders to payment of money. Yes sir?
>
> J: Yes.
>
> ...
>
> S: Okay, whatever the case maybe. The BOD never agreed for the bank account of SRC to be managed using electronic instructions. Remember we went through this. The BOD resolution doesn't say anything about being able to give instruction to the bank from SRC by email or electronic means?
>
> J: Yes. That is in the resolution because I can't recall, yes.
>
> S: No. It is not in the resolution. There is another resolution that talked about general banking arrangement?
>
> J: Banking arrangement, yes.
>
> S: Which have that phrase on electronic banking.
>
> J: Okay, alright.
>
> S: Which was not in your?
>
> J: The specific one.
>
> S: Ya, the specific one. Correct.
>
> J: Okay.
>
> S: From your memory you can also tell us, you all were never of the view that the bank account of SRC could be operated through electronic means?
>
> J: As far as I can recall. As far as I can remember.

[1611]Despite the defence's assertion that this DCR in D519 is not in the records maintained at the JRC Branch, PW39 testified that SRC could operate its bank account on electronic instructions by virtue of the DCR in D519. And the conduct of AmBank further confirms that parties acted based on the understanding that they could act on scanned instruction letters.

[1612]There was really never any dispute on the bank acting on scanned instruction letters. Krystle Yap (DW2) also confirmed that by sending the scanned instruction letters to the Branch, the bank was acting on the understanding that it had the mandate to act on scanned letters. DW2 testified to the above in the notes of proceedings dated 4 February 2020 — DW2:

> S: And you would confirm that the scanned letters of instruction had caused the transfer out of millions of ringgit from the SRC and Gandingan Mentari accounts, correct?
>
> J: Yes.
>
> S: Had SRC or Gandingan Mentari, to the best of your knowledge, ever complained that the bank had wrongly acted on this scanned letter of instruction?
>
> J: No.
>
> ...
>
> S: I am just asking you, are you aware if so you sending across the signed instruction indemnity letter presupposes that you are acting on the belief that there was in place a signed instruction indemnity letter in the SRC fund?
>
> Counsel: You acting on the scanned instruction letter, presupposes there was in place a signed.
>
> S: My learned friend has put it, thank you, I can't pay any fees. You got the fact that you sent it to the branch, you were of the belief that there was in existence this document, which you have referred to as instruction indemnity letter? Correct?
>
> J: Correct.
>
> ...
>
> S: To the best of your knowledge Krystle, was there any complaint from SRC and Gandingan Mentari that the bank had acted without authority in processing and transferring these RM40milllion from SRC to Gandingan Mentari and from Gandingan Mentari to Ihsan Perdana?
>
> J: No.

[1613]Although she could not recall whether she was informed that it was acceptable to act on scanned instructions, DW2 was clear in stating that it was for the branch to make the call. The fact is Am-Islamic Bank did execute the same. Further, neither did either of SRC or GMSB take any action against the AmBank for acting beyond its mandate by having acted on scanned letters of

instruction. It is also somewhat odd that the accused who had in this context no contractual relationship with AmBank in respect of the specific transfers from SRC and GMSB is challenging the bank's right to act on the scanned letters of instruction as endorsed by SRC and GMSB. I repeat that the complaint by the defence that the instruction could not have been lawfully effected because it was not in the hard copy original version is misconceived because P277 was issued by the accused himself as the bank account holder and sent to Am-Islamic Bank. Even if the terms and conditions of the banking relationship on the use of account specified that soft copy and email instructions must still be followed by the original hard copy version before the same would be acted upon, in this case the bank had agreed to execute the same. Contractually, which was what the relationship between the accused and AmBank was, the latter was fully entitled to waive strict compliance by the accused (or any other customer) with the condition. In fact evidence from PW21, PW54 and DW2 suggest that such waiver was not uncommon. In view of the evidence that the execution of instructions given not in their original hard copy version were not uncommon, the related argument of the defence that a fraud or deception was perpetrated against the accused (which resulted in the criminal charges against him) because the instructions in the letter in P277 as well as those concerning the transfers of funds from SRC to GMSB and from GMSB to IPSB were all given to Am-Islamic Bank not in their original hard copy but in their scanned copy version, cannot therefore be sustained.

[1614]Of significance is the fact that evidence shows that even without the letter of indemnity, the RM42m transaction in question and even the earlier RM4 billion transactions were duly effected since the signatures on the instruction letters were similar to the specimen signatures. And in addition, all the aforesaid transactions were recorded in the relevant bank statements for SRC and GMSB without any protest. No less importantly there has never been any allegation of wrongful debit of monies out of SRC and GMSB.

[1615]As such I cannot but agree with the submission of the prosecution that the purported issue of the RM42m being transacted beyond the mandate is a mere red herring at this trial.

The evidence of Dato' Rosman Abdullah (DW8)

[1616]There are other aspects of the testimony of this witness which are relevant to the discussion concerning management of the accounts of the accused and other aspects of the case of the defence, which shall as such be dealt with later. For present purposes, the defence reiterates that the evidence of Dato' Rosman Abdullah (DW8), the managing director and as an authorised signatory of Putrajaya Perdana Bhd ('PPB'), a listed construction and property development company, as well as its subsidiaries, Permai Binaraya Sdn Bhd

('PBSB') and Putra Perdana Construction Sdn Bhd ('PPC') reveals that RM170m was ultimately transferred from SRC to PPC and was utilised by Jho Low, who instructed, inter alia, for RM140m to be paid to Jho Low's other company, an outfit known as Unity Capital on 11 August 2014 as part of the purchase of shares in Iskandar (Holdings) Co Ltd by PPB.

[1617]Jho Low had also instructed DW8 for RM27m to be transferred to Account 880 from PBSB on 8 July 2014 and thereafter on 10 September 2014, for another RM5m to be transferred by PPC to Account 906. DW8 claimed he was never told that Accounts 880 and 906 belonged to the accused.

[1618]Eventually, on Jho Low's instructions, PPB drew down RM140m from a financing facility with Maybank and the same was transferred to SRC vide PPC on 12 December 2014. Jho Low held out to DW8 that the deal he was allegedly negotiating had been aborted and the RM170m was to be returned to SRC. On 29 December 2014, RM27m and RM5m was transacted into PBSB and PPC (pursuant to the instruction to Am-Islamic Bank dated 24 December 2014 in exh P277 signed by the accused) and Jho Low also instructed for RM30m therefrom to be transferred to SRC vide PBSB on 7 January 2015.

[1619]The defence thus submitted that the evidence of DW8 establishes that Jho Low was instrumentally involved in the transfer of RM170m from SRC to PPC and had utilised the same through his instructions. Significantly, the RM27m and RM5m transferred from PBSB and PPC to Account 880 and Account 906 on 8 July 2014 and 10 September 2014 were all undertaken under the instructions of Jho Low. There were no dealings between the accused and the PPB Group and in particular there was no agreement or arrangement on an advance of RM32m from PBSB and PPC into the two personal accounts of the accused.

[1620]Further, sometime in early 2015, DW8 was instructed by Jho Low to execute a Turnkey agreement between PPC and Gandingan Mentari Sdn Bhd ('GMSB'), a subsidiary of SRC, for the utilisation of RM140m (D528). Jho Low represented that the same was merely to document that the contract with Jho Low had been aborted. DW8 had never seen the letter dated 8 August 2014 from SRC to PPC which purported to increase the investment funds under the Turnkey agreement from RM140m to RM170m (D531). The defence alleged that Jho Low caused the documents on the Turnkey agreement in D528 and D531 to be created in a bid to disguise his utilisation of the RM170m from SRC.

[1621]On Jho Low specifically, as recorded in the notes of proceedings dated 26 February 2020 — DW8, DW8 testified that:

Subsequent to my arrest and remand, and now having what seems to be a clear picture of what happened in the RM170M transfers episode, I would describe him as a highly smooth and effective scammer in so far as these transactions are concerned.

[1622]DW8, who was a very close friend of Datuk Azlin Alias who was the principal private secretary to the Prime Minister (then the accused) also gave evidence that Datuk Azlin was not involved in the transactions of the RM170m from SRC to PPB Group. Importantly, DW8 also denied that he was ever informed by Datuk Azlin of the involvement of the accused or that the accused was ever in need of funds. This exchange was recorded in the notes of proceedings dated 26 February 2020 — DW8:

S: So Dato' Rosman, my learned friend put it to you that you are close to Dato' Azlin and you agreed. 2014 and 2015 did Dato' Azlin ever tell you that my client Dato' Sri Najib needs money, did he ever tell you this?

J: No.

S: Did he ever suggest to you, can you please borrow some of your funds to DSN?

J: Never.

S: Okay, apart from this initial meeting with Jho Low at Dorchester hotel in London with Azlin, after that was there any other dealings concerning with PPB or its subsidiaries, with Jho Low, RM170million with JhoLow and Azlin? Was Azlin involved in any of that?

J: Arwah Dato' Azlin was never involved in any dealings involving PPC and PPD or JhoLow other than making the introduction to me for me to see Jho Low in July 2011.

[1623]The defence thus highlighted that DW8's testimony creates reasonable doubt on Datuk Azlin's involvement in relation to the RM42m transactions.

[1624]I make four observations. First, the question on the involvement of Datuk Azlin in respect of the RM42m transactions has been discussed at the close of the prosecution case, particularly on his role in the transfers of the total sum of RM42m from Ihsan Perdana Sdn Bhd ('IPSB') to Accounts 880 and 906.

[1625]Also, as I will discuss further when considering the defence of the accused having no knowledge on his account balance, the testimony of the accused himself gives much emphasis on the role of Datuk Azlin, together with Jho Low and Nik Faisal in the management of the personal bank accounts of the accused, particularly in ensuring the sufficiency of funds in the accounts to enable the accused make payments by writing cheques out of these accounts.

[1626]I must emphasise that the testimony of the accused that Datuk Azlin was delegated with the responsibility to help manage and supervise the accounts of the accused is even stated in the defence statement of the accused issued before commencement of the trial under s 62 of the MACC Act. The accused in his testimony especially identified Datuk Azlin, as the one with whom the accused would check, albeit occasionally on whether he could issue cheques out of these accounts.

[1627]Evidence shows, as will be discussed further, that Datuk Azlin must have known very much more about the balances of the accounts, even to the extent of the accused suggesting, incredulously, that Datuk Azlin could have even concealed about the RM42m transactions from SRC from the accused. The evidence of DW8 who had no dealings with the accounts of the accused (apart from the transfers from PBSB and PPC to Accounts 880 and 906 in July and September 2014), cannot be construed as creating reasonable doubts on the involvement of Datuk Azlin in the RM42m transactions. After all, merely being a close friend of Datuk Azlin does not mean that DW8 would be updated by his late principal private secretary of the Prime Minister friend of the dealings involving the personal accounts of the Prime Minister, not to mention the existence of a binding oath of secrecy.

[1628]Secondly, this attempt by the defence to demonstrate the instrumental role of Jho Low in the many transactions involving SRC and the PPB Group does not in any fashion equate to the non-involvement of the accused. Far from it. For example, the defence is unrelenting in raising the argument that the transfers from the accused's Accounts 880 and 906 to PBSB and PPC on 29 December 2014 were a 'reversal transaction' for Jho Low's benefit.

[1629]However, despite other possible objectives of Jho Low, it has been established on evidence that the purpose of the transfers relevant to the three CBT charges was for the accused to repay the advances from PBSB and PPC (as supported by para 17.2 of the audited financial statements of PPB Group (D661)), which had earlier been used by the accused to regularise the balances in the accounts of the accused. And crucially, the transfers were executed on the instructions issued by the accused himself (in exh P277). It has thus also been shown that the accused must have known about the balances and sources of the funds in his very active accounts.

[1630]Thirdly, that Jho Low had a direct line of communication with the accused is further confirmed by the testimony of DW8. In the notes of proceedings dated 27 February 2020 — DW8:

> S: And Dato', you also knew from Dato Azlin that Jho Low had a direct contact or hubungan terus with Dato Sri Najib?

J: Yes, that was what I mentioned in my MACC statement.

[1631]Although the accused had tried to play down the degree of contact he had with Jho Low, his own testimony that Jho Low (together with Datuk Azlin and Nik Faisal) was responsible to ensure sufficiency of funds in the accused's accounts makes that state of affairs of limited communication highly improbable. Now even DW8 attested to what he knew about that relationship. This evidence of DW8 further fortifies the narrative that Jho Low was transferring funds into the accounts of the accused for the accused to utilise them.

[1632]Fourthly, even though DW8 testified to not having been told by Jho Low that the recipient Accounts 880 and 906 for the RM32m to be transferred from PBSB and PPC belonged to the accused, his answers in cross-examination raise a strong suspicion that he actually knew that the RM32m was to be transferred to the accused. In the notes of proceedings dated 27 February 2020 — DW8:

S: ... So, we will come to the transactions you referred to. On the 8th July 2014, Jho Low informed you that there would be monies coming into PPC's account which had to be transferred to several other accounts.

J: Yes.

S: And this money he was referring to on the 8th July 2014, was RM35million?

J: Yes.

S: Which came from SRC?

J: That's what the BBM states. If I could add my Lord, that's what the BBM said, but in our bank statement, it doesn't state SRC. It just stated 'not applicable'.

...

S: Let's move on sir. In fact Jho Low informed you that money from SRC were an advance from a contract that was to be signed?

J: Yes.

S: And Jho Low informed you that one of the recipients of SRC money was AmPrivate Banking 1MY. For a sum of RM27million?

J: Yes, that's what the BBM message stated.

...

S: And on the same day, on the 8th July 2014, Jho Low asked you to inform him after the transfer of this RM27million to Am Private Banking 1MY was carried out, correct?

J: Yes.

S: He asked you to inform him so that he could inform his boss.

J: Yes, that's what he said.

S: And when Jho Low mentioned 'boss' at that time, you knew that 'boss' referred to DSN?

J: Yes.

S: And this sir, to be fair to you, you knew from the previous communications with Jho Low where he always referred to DSN as his boss?

J: Yes.

The evidence of Tan Sri Apandi Ali (DW14) and Tan Sri Dzulkifli Ahmad (DW17)

[1633]Like its response to the charge on abuse of position under s 23 of the MACC Act referred to earlier, the defence here also submitted on the testimony of Tan Sri Apandi Ali (DW14), the former attorney general, in particular to his findings on the SRC's RM42m transactions as released by the Attorney General's Chambers (AGC) in the two press statements dated 18 January 2016 (D779) and 26 January 2016 (D780). In the latter, the key findings, as reproduced, include that:

(a) there are no evidence to show that YAB PM had solicited or was promised any gratification from any party either before, during or after the Cabinet decision was made;

(b) there are no evidence to show that YAB PM had any knowledge and/or was informed that monies had been transferred into his personal accounts from the account of SRC International; and

(c) there are no evidence to show that YAB PM had given his approval for the transfer of monies from the account of SRC International into his personal account.

[1634]PW14 testified that the review of the SRC investigations was assisted by Tan Sri Dzulkifli Ahmad (DW17), and his team of six other deputy public prosecutors. According to the investigating officer for this case (PW57), the investigation by the MACC into the RM42m SRC funds commenced on 6 July 2015 following the lodgement of report 252/2015. As I have discussed earlier, DW17 supported the testimony of DW14, where upon the review and discussions with the attorney general, the attorney general proposed that the IP on the SRC investigation be returned to MACC for the latter to update the attorney general on two matters. First, to identify any evidence that the accused had knowledge that the RM42m which flowed into his accounts was from SRC, and secondly whether there was any evidence of the accused having instructed any party to effect the said transfers of the RM42m into his

accounts. The fact that the IP was returned to MACC for further investigation was publicised in the AG media release of 18 January 2016 (D779).

[1635]The MACC returned the IP in early January 2016 to the AGC. Eeven though the MACC did revert to the attorney general on the two matters requested of them, and clarification was provided by MACC in the minute of the IP returned to the attorney general, there was no change to the position highlighted to the attorney general previously. Neither did the MACC inform the AGC that they needed more time to complete any further investigations.

[1636]This then led to the attorney general announcing on 26 January 2016 on the NFA classification of the IP. DW17 testified that the suggestions and findings of the attorney general were brought to the MACC's operations review panel, which recommended that the attorney general revisit the decision. However, the DW17 did not know if the former attorney general decided to follow its suggestion or not.The press statement (D780) dealt with both the SRC and the RM2.6m cases together since they were inter-related, in the sense that the accused claimed that the source of the RM42m was from the Arab royalty donations, which was the RM2.6m. DW14's conclusion as announced at the press conference of 26 January 2016 that the accused had no knowledge that the funds came from SRC was according to the witness based on his study of the investigation papers submitted to his office by MACC. But he stressed that the determination was entirely based on the evidence as disclosed therein as at 26 January 2016.

[1637]As such, as I have emphasised earlier, the evidence by both DW14 and DW17 is unequivocal in that their review of the IP was on the basis of the most updated evidence made available in the IP on the date of the release of the press statement (D780) and the press conference on 26 January 2016. They both admitted that they were not aware of further investigations that were conducted subsequent to that date, which as stated by the lead prosecutor to have involved 76 further or new statements recorded from new witnesses and additional statements taken from previous witnesses. Nor was either of DW14 or DW17 aware of the evidence of admission of knowledge contained in the affidavit affirmed by the accused in a defamation suit.This is the affidavit that was affirmed by the accused for the purposes of a civil suit against Tun Ling Liong Sik (P616A), where the accused affirmed that he knew the RM42m which was remitted into his personal accounts came from SRC. This was outside the personal knowledge of both DW14 and DW17 and did not form part of their considerations at the material time. As admitted by PW57, this affidavit did not arise from investigations prior to the accused being charged and was only discovered later.

[1638]There is also another aspect in the evidence given by DW14 that is of interest. DW14 testified that he decided to close the investigations against the accused as he was satisfied that the funds in issue were donations from the Saudi Royal family. DW14 also confirmed that the two flow charts he held up during his press conference on 26 January 2016 (P802 and P803) were the same as what could be seen in the coloured photograph of him at the press conference on the same day (P804). Yet, both the flow charts (P802 and P803) showed the funds entering the accounts of the accused had originated from SRC, and not from any donation of the Saudi Royal family.

[1639]There are two other observations. First, the investigations by MACC as recorded in the IP by MACC and subsequently sent to the AGC on 31 December 2015 was stated by DW17 in relationtothe offence under s 403 of the Penal Code on criminal misappropriation, and not the present charges under s 409 on CBT. Secondly, the press statement issued by the AGC on 26 January 2016 did not include any specificreference to money laundering offences at all. The present charges now include three charges under s 4 of the AMLATFPUAA.

Whether the SRC and GMSB transactions on the RM42m were known to the board of directors

[1640]The accused also advanced other arguments including those previously raised at the end of the prosecution case which according to the defence was consistent with his non-involvement or absence of knowledge in the RM42m transactions. These included:

(a) the transactions of funds from SRC in 2014 and 2015 including the RM42m into the accused's accounts and the RM32m transaction by way of what the defence said was the forged instruction in P277 appeared to have been undertaken at the behest of Jho Low through, inter alia, Joanna Yu (PW54), Jerome Lee, Ung Su Ling (PW49), Dennis See and Terrence Geh, for Jho Low's own purposes;

(b) PW42's testimony that it had been represented by Nik Faisal that the CSR appointment of IPSB was from 'pihak atas' was incredible. Exhibit P487 which purported to be SRC's appointment letter for IPSB as CSR partner was dubious as Nik Faisal was no longer the CEO in September 2014, and there was no Board approval for the same;

(c) PW42's change of position on knowledge and involvement of the funds transfers from accounts of SRC and GMSB; and

(d) Jho Low ultimately benefitting from the transactions of funds from SRC's accounts.

[1641]I accept the evidence of Tan Sri Ismee (PW39), the chairman of SRC (until 15 August 2014) that he did not sign any instruction letters of SRC with regards to any financial transactions and was unaware of who signed the same at the material time. PW39 also admitted that he and the board were unaware of the existence of the company's Account 736, and the same was operated without the board's knowledge or approval. They were not in the know of any of the actual transactions in either the two accounts of SRC in Account 650 or Account 736, and could not explain how any of those transactions were carried out. PW39 said that he was not involved in the affairs of SRC's subsidiary, GMSB, whose directors were Nik Faisal and PW42.

[1642]More specifically on Datuk Suboh (PW42), who continued to be a director of SRC during the period of the said misappropriation, the defence highlighted that Krystle Yap (DW2) of AmBank had confirmed that she never dealt with PW42. Notably the emailed soft copy instruction letters all carried identical signatures of PW42.

[1643]According to the defence, the evidence of DW2 who was in the team at AmBank led by Joanna Yu (PW54) now provides credence to PW42's ultimate concessions that he did not have any knowledge or involvement in any fund transactions of SRC or GMSB and that he did not sign any instruction letters for the same. PW42 was during cross-examination taken through the soft copy instruction letters and comparisons were made with transparencies thereof. PW42 appeared to have eventually admitted that his signatures on those soft copy instruction letters could have been forged. Consider this in the notes of proceedings on 3 July 2019 — PW42:

> S: Even with regard to the opening of bank account, Datuk had justified that yes, I signed the bank opening statement, bank opening form but now, what transpires in that account I will be correct to say is beyond Datuk's knowledge?
>
> J: Yes.
>
> ...
>
> S: ... Have a look at that document Datuk, P266 is a statement of account of the bank account of Gandingan Mentari for the period 23.07.2014 up to 31.08.2015. the statement is backward so DAtuk the earliest date is the last page, the latest date is the first page?
>
> J: What date you said?
>
> S: The first entry in the statement which is the last page of the document Datuk. Is on the 23.07.2014, a deposit of 500 dollar, RM500. Sorry. And the last entry on the first page of the document is its balance carry forward of RM859.73.
>
> J: Okay.
>
> S: Right, the period datuk can see, last page is 23.07.2014. 2014 you can noted on the top right of that page?

J: Alright.

S: And first page last entry of this statement Datuk can see the date on the top 31.08.2015. yes, sir?

J: Okay.

S: Yes, sir. So far we are alright. Now, Datuk looking at the transaction in the statement and quite a huge transaction both credit money going in and debit which is money going out. Just have a rough flip. Datuk can see it. There is quite a huge transaction in this account?

J: Okay.

...

S: Datuk is quite clear just now when I ask you, you are not aware of any financial transaction in Gandingan Mentari?

J: Yes.

S: So, how these debit and credit transactions took place is beyond your knowledge?

J: Yes, okay.

...

S: I'm gonna call it 736 account. The one the board doesn't know. P107. Datuk, obviously you have not seen this statement of account ever. Correct?

J: Never.

S: Whatever transaction has transpired in this very thick statement you see from January 2011 all the way to August 2015, these are all transaction beyond your knowledge?

J: Yes.

S: How these transactions transpired, how the money came in, how the money goes out, not within your knowledge Datuk and definitely not with your approval as a director?

J: Yes.

...

S: First KWAP loan comes in, then 28th August 2011 it goes out, where it goes, nobody knows, correct?

J: Yes.

S: Second KWAP loan, 28th March 2012 comes in. 30th March it goes out. Again, where it goes, nobody knows. At that point, 30th March 2012, the most substantial asset of SRC RM 4 billion ringgit from KWAP has already gone out. From memory Dato', he's never told where it went.

J: Yes.

S: What monies thereafter came, because if you look at 256, there is a lot of transactions coming in and out, where they are going in and out from, how these transactions are even taking place, Datuk does not know, ya?

J: Yes.

[1644]PW42 also conceded that he did not sign any instruction letter to transfer funds from SRC to GMSB to IPSB:

S: And then you went on to say, apabila saya melihat pada ruang tandatangan authorised signatories pada surat RENTAS transfer SRC kepada anak syarikat GMSB dan surat transfer GMSB kepada IPSB, itu adalah bukan tandatangan saya. Clear ya? You made crystal clear statement after you examined all the 13 forms. That's number one. Then you said, seingat saya, saya tidak ada dan tidak pernah menandatangan di mana-mana surat RENTAS transfer daripada SRC, GMSB dan IPSB. So you actually said from your recollection you transferred no such funds and you did not sign any such transfer, correct?

J: Yes.

S: Now, when you remember you did not transfer any such funds, was there an additional reason why you know this is not your signature. Must be isn't it? You remember that you didn't transfer such funds, it helped you say that this is not your signature.

J: Ya.

[1645]The defence therefore submitted that a re-evaluation of the evidence given by PW42 raises matters which cast doubt on the prosecution's case and the prima facie findings. First, PW42 was unaware of any of the transactions involving funds in the accounts of SRC and GMSB and did not execute any of the emailed soft copy instruction letters by which funds were transacted from the accounts of SRC and GMSB and PW42's signatures on the soft copy instruction letters were forged. Secondly, PW42 therefore was not involved in the transactions relating to RM42m from the account of SRC being channeled to GMSB and thereafter to IPSB and had no knowledge of the same and his signatures on the six instruction letters were forged.

[1646]In addition, DW2's evidence is also that she never dealt with Nik Faisal and only interacted with Terence Geh or See Yoke Peng. This, according to the defence corroborated the prosecution's suggestions that even Nik Faisal's signature on all the soft copy instruction letters of SRC and GMSB were forged by third parties. This is the exchange in the notes of proceedings dated 8 July 2019 — PW42:

S: So the first set 4, matched, and then we showed you 10 it was identical, you agree looking at those signatures that it would appear that someone cut and paste Nik Faisal's signature?Just like yours, am I correct?

J: It could be.

S: Yes. And just the questions they ask you, so the same questions I want to pose to you. So it could mean that Nik Faisal did not sign all the 10 and the 14 RENTAS. Am I correct?

J: Yes.

Counsel: I am to remind my learned friend not to lead. This is Re. You can't lead. He has to ask direct or rather in Re he cannot ask direct question just as in examination in chief.

S: I accept that. These are established evidence, My Lord. This was just shown from the witness that said, from that, I am just asking. So do you know who forged, as what my learned friend said, forged or cut and paste Nik Faisal's signatures?

J: I don't' know.

S: Are you now surprise just like yours?

J: Yes, I am very surprise.

S: Nik Faisal signatures also cut and paste?

J: Yes.

[1647]In my assessment, first, it cannot be considered surprising that PW39 and PW42 lacked the knowledge of the RM42m transaction out of SRC because it was Nik Faisal who conducted the day-to-day running of SRC, including all financial transactions. Nik Faisal also consistently represented to the directors that he was acting on the instructions of the accused. He was the link person between the directors of SRC and the accused, as testified by both PW39 and PW42. Nik Faisal was, as I have found, a key person through whom the accused exercised overarching control over all matters related to SRC including its properties which included the RM42m in question.

[1648]Secondly, in relation to the RM4 billion transaction, PW39 had testified that the RM4 billion loan from KWAP to SRC were dealt with by the directors based on the shareholder instructions signed by the accused. Thus despite the fact that the directors or PW39 were not aware of the existence of two separate company's bank accounts with AmBank, the monies in both of the accounts were known to the directors and acted upon by them.

[1649]Thirdly, in relation to PW42's involvement in the RM42m transaction, PW42 explained in his testimony that his knowledge of the matter is limited to what was informed to him by Nik Faisal. PW42 testified that he complied with all of Nik Faisal's requests to sign all documents of SRC and GMSB without enquiring into the legitimacy of those documents. PW42 was not concerned with or aware of the day-to-day running of SRC or GMSB.

[1650]Nik Faisal had always been the highest ranking executive in SRC. He was at the same time the mandate holder of the accused's personal accounts. Even after his removal as the CEO of SRC for governance concerns effective 11 August 2014, Nik Faisal continued to be a member of the board of directors and more importantly remaineda signatory of the SRC and GMSB funds. Nor was his status as the mandate holder for the accused's personal accounts in any manner affected. The inference is his signature was necessary to effect the transfer of funds as directed by the accused including this transfer of the RM42m into the accused's accounts.

Whether the 'cut & paste' signatures of Nik Faisal and PW42 on SRC and GMSB documents establish forgery?

[1651]In relation to the argument about the *cut and paste* signatures of PW42 and Nik Faisal on the relevant instructions concerning the transfers of the RM42m subject to the charges, there is nothing of substance introduced by the defence during the defence stage that I have not already considered. In view of the totality of the evidence at the end of the case I find the assertion that PW42 could not have written his signatures in identical fashion is reasonable. That he did not actually even sign any of the transfer instructions alongside Nik Faisal is also not unreasonable. But this does not weaken the case of the prosecution, and in no way exculpatory to the accused.

[1652]First, even though PW42 testified that it was possible that he could not have signed the transfers upon being shown of the identical feature of all of the signatures attributed to him, he never said that he would not have put his signature on the transfer instructions. He was an authorised signatory. In fact he initially testified that he had signed them, in accordance with the requests from Nik Faisal. PW42 did not find anything wrong with the transfer instructions. He was for all intents and purposes oblivious to the documents he was asked to sign on.

[1653]What is clear from his testimony is that he could not exactly remember what he had signed. Which is not unexpected either. The material period in question is about five years before he testified in this court, and not to mention the intervening deteriorating health which even resulted in PW42 suffering a stroke. And it was also shown by the prosecution in re-examination that even the signatures of Nik Faisal on the same transfer instructions were the product of *cutting and pasting*.

[1654]Secondly, as I have said, there is nothing wrong with having transfer instructions which bear a photocopied signature or a digital signature of a signatory. It is a generally accepted business practice, for as long as the signatory agreed to the subject matter of the document bearing the signatures, for his

A sample signature be used for any such purpose, and for any additional requirements that may be imposed by the banks.

[1655]I agree with the contention of the prosecution that it is settled banking law and practice that the customer, like the accused is legally and contractually
B obliged to scrutinize, verify, and be held responsible for all transactions conducted in his current accounts.

[1656]The accused's account holder's acceptance of the terms, inter alia, of the
C opening of his current accounts with AmBank in P57(1), P58(1) and P59(1) respectively is produced verbatim below:

> I/we hereby acknowledge that I/We
>
> (v) voluntarily open this account
>
> (vi) responsible for all transactions conducted under the account
>
> (vii) will scrutinize and verify all transaction under this account
>
> (viii) shall be liable for all transactions through the account which are in violation of the law.

E

[1657]It is no surprise that these transactions by SRC and GMSB on the transfers were given effect to by Am-Islamic Bank because the signatures on the instruction letters do in my observation appear similar to the relevant specimen
F signature.

[1658]In addition, despite the evidence of DW2, these instructions contained notations that confirmation was, as per standard process, obtained from representatives of SRC and GMSB for the transfers to be executed.

G

[1659]In any event, importantly, all transactions were acted on by the bank and recorded in all the relevant bank statements for each of the accounts. Also, as the prosecution correctly submitted, the bank could act on the scanned copies of letters as this is customary practice especially applicable when
H signatories are out of the country.

[1660]At any rate, SRC or GMSB had not to date questioned the legitimacy of the transactions carried out using scanned copies. As such the dispute on the execution of the transfers is in my view but a convenient afterthought.

I

[1661]And neither was there any suggestion let alone evidence that there had been any wrongful credit or debit of monies which amounted to millions in Ringgit Malaysia out of the accounts of SRC and GMSB on the basis of the *cut and paste* copied signatures. Not by SRC or GMSB, and not by any other party.

[1662]In my view it was likely that Nik Faisal himself who was the link person in SRC with the accused and the mandate holder for the accused's three private accounts at AmBank or another person acting on his instruction who had prepared the transfer instructions and placed the specimen signatures of both Nik Faisal and PW42 on them.

Whether the RM42m originated from SRC

[1663]The defence then repeated the argument that the prosecution failed to prove that the RM42m in question was part of the RM4 billion financing extended by KWAP to SRC or were from funds belonging to SRC. Now the defence raised the evidence of DW2 that the transactions of SRC funds being undertaken by soft copy instruction letters through See Yoke Peng (head of finance at SRC) or Terrence Geh (1MDB executive).

[1664]Documentary evidence as adduced earlier at the prosecution stage shows that the RM4 billion was disbursed out almost immediately upon receipt in 2011 and 2012 respectively. Further, PW39 and PW42 were also unaware of these outward transfers of SRC funds.

[1665]There however is patently no substance to this contention. It has been detailed out by the elaborate money trail evidence that the very sum of RM42m subject to the instant criminal charges found its origin in the account of SRC. It was transferred to the two accounts of the accused (Account 880 and Account 906) after having been channelled through the two intermediaries which were GMSB and IPSB.

[1666]I am not unmindful that the investigating officer (PW57) did testify under cross-examination that the RM140m transferred into SRC on 12 December 2014 was not sourced from the KWAP loan but from the drawdown of the Maybank loan by PPB. But I find this irrelevant to the fact that the RM42m which entered into the two accounts of the accused did on evidence come from SRC.

[1667] The source of the RM42m in SRC itself is not the concern of the charges against the accused. The RM42m was the funds of SRC even if it was true it came from the Maybank loan in as much as the RM4 billion belonged to SRC even though these are proceeds from the financing taken by SRC from KWAP.

[1668]In any event it is not necessary for the purposes of the charges for the prosecution to prove the actual source of the RM42m which has anyway been proved on money trail evidence to have been transacted out of SRC.

Whether Jho Low caused the SRC and GMSB transactions for own purposes

[1669]A recurring contention of the defence is that in light of the evidence of DW8, DW2 and the accused, the evidence as a whole would support the inference that all the SRC and GMSB transactions which were executed by way of the soft copy instruction letters were carried out on the instructions of Jho Low for Jho Low's own ulterior purpose.

[1670]This is primarily based on the following evidence:

(a) transactions vide the emailed instruction letters of SRC and GMSB were undertaken through emails from Terrence Geh or See Yoke Peng and were part of a singular modus operandi; and

(b) the transaction of funds from the SRC and GMSB accounts were conducted at the behest of Jho Low and for his benefit, purpose or ulterior agenda and can be divided into the following broad headings:

(i) RM170m from SRC and what the defence referred to as the 'reversal' transactions;

(ii) the Mail Global Resources transactions; and

(iii) the February 2015 transactions.

[1671]As for the RM170m, the defence referred to DW8's testimony which it asserted corroborates the contents of the BBM messages (P578) and other contemporaneous documents as admitted by PW54 which all established that it was Jho Low who had caused SRC to transfer RM170m to PPC which Jho Low then utilised. Jho Low also caused funds to be transacted from PBSB and PPC to the accused's Account 880 (RM27m) and Account 906 (RM5m, since the account got into overdrawn position as a result of a RM5m cheque to UMNO being presented for payment) in July and September 2014, respectively.

[1672]RM140m was channeled towards advance payment of balance purchase price to Unity Capital on 11 August 2014 for the acquisition of shares in Iskandar Holdings. Eventually it was also Jho Low who caused the transaction which, according to the defence, enabled the accounts of PPB Group to reflect a zerorised position as part of what the defence called a reversal transaction, which included the RM32m, which was channeled from SRC to the same accounts of the accused in December 2014 and transferred back to SRC in January 2015.

[1673]On 11 December 2014, PPB drew-down on a RM140m loan facility from Maybank (secured, inter alia, by a charge over shares in Iskandar

Holdings that was acquired by PPB) and the RM140m was eventually channeled back to SRC through PPB on 12 December 2014. This was confirmed by DW8 to have been a transaction carried out on the instructions of Jho Low.

[1674]It is the defence's further contention that on 24 December 2014 Jho Low caused Terrence Geh to transfer RM40m from SRC to GMSB and from GMSB to IPSB. This was, inter alia, to enable RM32m to be transferred to the Accounts 880 and 906 in order to carry out the said 'reversal' transactions. This finally got effected by the letter of instruction signed by the accused (P277) which the defence said was forged by or at the behest of Jho Low.

[1675] In any event, the RM32m transacted from SRC to GMSB, and then from GMSB to IPSB, and then from IPSB to Accounts 880 and 906 was utilised purely to carry out the 29 December 2014 onward transaction to PBSB and PPC in order to reflect the purported 'reversal' of the earlier transactions. DW8 confirmed that the funds into PBSB and PPC on 29 December 2014 were towards Jho Low's utilisation of the same.

[1676]To complete this part of the picture, thereafter, on 7 January 2015, from the amounts transferred into PBSB and PPC, the sum of RM30m was transferred from PBSB to SRC. DW8 again confirmed that the transaction was carried out on the instructions of Jho Low. In fact, without the funds of RM32m being transferred out of SRC on 24 December 2014 and to Accounts 880 and 905 on 26 December 2014 and thereafter to PBSB and PPC, PBSB and PPC would not have any other funds to carry out the transfer of RM30m to SRC on 7 January 2015.

[1677]As for the transactions involving Mail Global Resources, a total of RM123m from SRC was transferred to IPSB pursuant to various instructions, and out of the RM123m, Dr Shamsul Anwar (PW37) of IPSB admitted that he was instructed by Dennis See to issue cash cheques amounting to RM58m to a money changer trading as Mail Global Resources (MGR).

[1678]The evidence from the investigating officer (PW57) is that MGR was controlled by one Redzuan Adamshah and that the funds were cashed out through MGR. MACC's investigations further concluded that Redzuan Adamshah was a business associate of Jho Low and was involved together with Jho Low (as well as Nik Faisal) in the misappropriation of SRC funds (P696 and P700).

[1679] In addition, PW37 further admitted that another RM3m was on 9 April 2015 transacted from SRC to GMSB, and then to IPSB, thus making the

total sum cashed out by Redzuan Adamshah through the funds channeled from SRC to GMSB, and then to IPSB to be RM61m.

[1680]And as for the February 2015 transactions, the defence's version is that Jho Low had through Terrence Geh caused RM5m to be transferred from SRC ultimately to IPSB on 5 February 2015 and another RM5m to be transferred from SRC ultimately to IPSB the day after on 6 February 2015 through the use of four allegedly 'forged' soft copy instruction letters.

[1681]It is contended that these transactions were caused by Jho Low as a knee jerk reaction when Joanna Yu (PW54) reported to him that the accused's accounts were in overdrawn positions and that the bank would reject cheques issued therefrom unless funds were immediately transferred to regularise the accounts.

[1682]This resulted in Jho Low arranging for the funds to be transferred to IPSB and for transfers be made from IPSB to Account 880. The defence argued that Jho Low's desperation to prevent the dishonoring of cheques was to avoid queries being made into the transactions in the accounts which would have revealed the past inaccurate reporting of the transactions and account balances in the accounts and possibly therefrom, other untruths from being made known to the accused.

[1683]The defence thus maintained its stance that the above transactions involving SRC which include the RM42m subject to the instant charges leads to the inference that Jho Low was in control of SRC and GMSB's accounts through Terrence Geh. This control enabled him to cause the transactions of funds from SRC and GMSB which were effected via the emailed soft copy instruction letters.

[1684]This is, so it is argued, further supported by the BBM chats (P578) between Joanna Yu (PW54) and Ung Su Ling (PW49), Terrence Geh and Jho Low and the Telegram messaging between PW54 and Terrence Geh (D581(1–10)). PW54 also ultimately admitted that from her involvement in matters, Jho Low was in control of SRC through Terrence Geh. PW54 further said that PW49 was also taking instructions from Jho Low.

[1685]Significantly, the defence is now contending that this proposition on Jho Low's control of SRC is also consistent with the evidence adduced during the defence case which the defence identifies as follows:

(a) DW2's evidence on the transaction from SRC and GMSB all being effected by way of soft copy instruction letters;

(b) DW8's evidence that the transactions in respect of the RM170m from SRC to PPC, the RM32m from PBSB and PPC to Accounts 880 and 906 on 8 July 2014 and 10 September 2014; the transfers back of the RM32m from these same accounts into PBSB and PPC on 29 December 2014; and the return of RM30m from PBSB to SRC on 7 January 2015 were all orchestrated by Jho Low. DW8 further confirmed that the PPB Group had no arrangement with the accused on any advances being made or returned;

(c) the findings of the attorney general on 26 January 2016 (D780) that the accused did not instruct for the RM42m to be transferred out from SRC;

(d) the accused's own testimony that he did not know of and was not involved in the RM42m transactions and had no knowledge of the same. He also testified that he had no arrangement with PBSB or PPC on any advance.

[1686]In my judgment, however, the defence's reliance on this evidence is woefully inadequate to advance its case. It is plainly unable to cause a dent on the prosecution case as established by evidence. Much less even raise a reasonable doubt.

[1687]Much has been repeated on Jho Low's involvement in causing the outward transfers of significant amounts of funds from SRC. And this included the RM42m in question. The RM170m, the transactions involving Mail Global Resources and the February 2015 transfers of RM10m into the accused's account. There is also evidence which strongly suggests among the purposes of the many transactions was to further his private business interest such as the purchase of shares in Iskandar Holdings.

[1688]However, in my judgment, in the context of the charges before this court, I agree that all these do not in any meaningful fashion doubt much less deny Jho Low's leading and crucial role of ensuring sufficiency of funds in the personal bank accounts of the accused, as evidence had more than amply demonstrated, and including as testified by the accused himself. The fact that Jho Low could control the finances of SRC through Terence Geh, consistent with the rest of the evidence, is indeed necessary for him to effectively and efficiently perform the role as entrusted to him (and to Datuk Azlin and Nik Faisal) by the accused vis a vis the management of the personal accounts of the accused. The accused himself in his testimony said that these three individuals were tasked with the management of his personal accounts. In other words, the defence evidence does not diminish but instead further confirms the role and involvement of not only Nik Faisal and Datuk Azlin but also Jho Low in the transfers of the funds from SRC as framed in the charges against the accused.

[1689]That SRC is the target of Jho Low for funds is also unsurprising given the overarching control the accused himself had over SRC. It has been established that the accused was entrusted with dominion over the property of SRC, given his multiple roles as the Prime Minister with special M&A powers over the directors of the company and its M&A, as the Finance Minister who is also the one and only shareholder of SRC as MOF Inc, and as its advisor emeritus. It has been shown that the accused had managed the company by the issuance of shareholder minutes, especially on matters concerning the application, receipt and use of the financing proceeds of RM4 billion from KWAP, which would then be followed by the directors of the company to be implemented. Again, this is entirely consistent with the finding on the overarching control of the accused over SRC and his relationship with Jho Low.

[1690]The evidence of Dato' Rosman (DW8) further supports the pivotal involvement of Jho Low in these transactions but more importantly for the charges against the accused, also confirms Jho Low's dedication to his task of ensuring sufficiency of funds in the accounts of the accused. This is made manifest by his instruction to DW8 for the transfers of the RM32m into Accounts 880 and 906 in July and September 2014. It was also clear to DW8 that Jho Low had a close association with the accused given the latter's reference to 'Boss' when mentioning the accused in conversations with DW8.

[1691]In so far as the evidence of Krystle Yap (DW2) that the transactions from SRC and GMSB were all being effected by way of soft copy instruction letters, again, whilst the defence may attribute this to the instructions of Jho Low, it is still very much consistent with the totality of evidence that establish that the transactions executed by Jho Low had been done also with the view to performing his role in managing the personal accounts of the accused, in the specific aspect of ensuring availability of funds in these accounts. The many transactions that Jho Low got involved in included exactly just that — to source for monies for his private interests and to fund the accounts of the accused.

[1692]Further, on the *cut and paste* instructions by Nik Faisal and PW42, I have already found this not to be out of the ordinary given general banking practice (which was why AmBank acted on them) and the absence of any complaints by either SRC and GMSB. Now, even if it was true that it was Terence Geh who, following the instructions of Jho Low, manipulated the signatures, instead of being the instructions of Nik Faisal and PW42 as directors of SRC, this still, as I have said, does not in any way make a dent in the prosecution case that Jho Low was serving the accused.

[1693]It cannot be emphasised enough that Jho Low, Nik Faisal and Terence Geh were all part of the same team led by Jho Low. After all, it is

incontrovertible that as a result of those instructions by SRC and GMSB, RM42m from SRC did flow into Account 880 and Account 906 of the accused. This represents a clear example of the fulfilment by Jho Low of his task as entrusted by the accused, and met with the requirements of the accused who would proceed to write cheques out of these accounts or permit regularisation of balances which had gone into the negative.

[1694]The accused's own testimony that he did not know of and was not involved in the RM42m transactions and had no knowledge of the same is entirely self-serving and manifestly contrary to the weight of evidence. The accused himself testified that Jho Low's role was to ensure sufficiency of funds in his accounts. It is therefore wholly unsurprisingly that the accused and Jho Low (as well as Nik Faisal and Datuk Azlin, both of whom were also specifically named by the accused for the same task) would be in contact on matters relating to the accused's accounts. What is surprising and difficult to believe is for the accused to say that the communication with Jho Low happened on very few occasions only.

[1695]That the accused also testified that he had no arrangement with PBSB or PPC on any advance is similarly contrary to evidence. I repeat that the accused had personally issued a written instruction to AmBank in exh P277 to transfer RM32m from his Accounts 880 and 906 dated 24 December 2014, two days before the arrival of the same sum of monies from SRC through GMSB and IPSB, and at the time that his accounts did not have RM32m to effect the transfers if not for the RM32m from SRC, the accused must have known, for him, to issue the instruction (P277) in the first place. The accused admitted he issued this instruction in P277 when his statement was recorded by the MACC, but during trial claimed that his signature could have been forged — a diametrically opposed stance which strongly objected by the prosecution who argued an afterthought on his part.

[1696]Notwithstanding the assertion that Jho Low orchestrated a withdrawal of RM170m from SRC and later effected a reversal of the same, and that the RM42m was from this RM170m, the evidence is plain that the purpose of the transfers of the RM32m by the accused was to repay the advance of the same sum earlier made by PBSB and PPC in July and September 2014 which had been utilised by the accused. That it was a repayment instead of a 'reversal' is evidenced even in the audited financial statements of PPB Group (D661), the listed holding company of PBSB and PPC, and as further confirmed by DW8, the managing director of PPB, then at the material time, and presently. It is as such entirely untrue that the accused had no dealings with PBSB and PPC or that the central role of Jho Low in the transactions involving SRC means the accused was neither involved in nor in the know about the RM42m transactions.

Whether Jho Low used sham documents

[1697]The defence raised the issue about the cover up of the RM170m from SRC to PPC through sham documents such as the Turnkey Agreement dated 7 July 2014 (D528) and the SRC letter dated 8 August 2014 addressed to PPC (D531) purportedly increasing the investment to up to RM170m. DW8, as mentioned earlier testified that what Jho Low had created were sham documents to disguise the purpose of RM170m SRC funds which were transferred to PPC and utilized by Jho Low. The Chairman of SRC (PW39) too acknowledged that the board of directors was unaware of the RM170m payments made to PPC and had no knowledge of the Turnkey agreement (D528) or the SRC letter (D531). Even PW57 agreed that Jho Low had instructed Terrence Geh and Nik Faisal to falsify the documents in D529 and D531 to cover up the RM170m transactions.

[1698]This the defence stated provides further support to its case that in 2015, Jho Low through Terrence Geh and Nik Faisal, created documents of SRC and GMSB, without the knowledge of the directors of SRC, as a means of concealing the transactions involving funds of SRC. The reason for and cause of the said transactions was thus, again, Jho Low.

[1699]Similarly, it is submitted that in light of defence evidence of documents being created to cover up the SRC transactions, re-evaluation of the evidence on the circumstances that led to the creation of a letter executed by PW42 and Nik Faisal dated 3 September 2014 (P487) in respect of the SRC-GMSB-IPSB transactions, which it was alleged that SRC had appointed IPSB as its CSR partner and had provided IPSB with a grant of RM250M, is warranted. PW42 also finally said he could not remember if he executed the letter.

[1700]This according to the defence shows that the SRC letter appointing IPSB (P487) and the grant of RM250m was merely made up in 2015 to conceal the transmission of RM123m from SRC to IPSB through various soft copy instructions in late 2014 and early 2015.

[1701]The defence therefore asserted that the inference that documents were created in 2015 to cover up the SRC fund transactions in respect of both the RM170m to PPC and the RM123m to IPSB is further fortified by the circumstances that led to the execution of four DCRs in 2015 which sought to ratify these transactions.

[1702]This is the evidence of Chee Suwen (PW51), the Company Secretary of SRC and GMSB from 1 May 2017 to 28 February 2017 who testified that after The Wall Street Journal published the news of the SRC transactions on 2 July 2015 (D772), at an emergency board meeting of SRC held on 3 July 2015 to

discuss the matters published which was attended by Dato' Azahar Osman Khairuddin, the CEO who succeeded Nik Faisal, Datuk Suboh (PW42) and Nik Faisal himself, during which time MACC officers appeared to seize documents, and upon queries whether there were resolutions of the board to authorise the transfer of funds out of the company, the CEO asked that PW51 prepare resolutions for ratification which PW51 eventually did. The four DCRs all dated 24 November 2015 are:

(a) SRC to ratify IPSB's CSR appointment (P567);

(b) GMSB to ratify payments from GMSB to IPSB (P568);

(c) SRC to ratify PW42's execution on the Turnkey agreement (D528) and Nik Faisal's execution of the letter (D531) (D606); and

(d) GMSB to ratify the D528 and D531 and further to ratify 'shareholders loans to GMSB' for D528 and D531 (P605);

[1703]This is the relevant part of the cross-examination of PW51 as recorded in the notes of evidence on 18 July 2019 — PW51:

S: All four of these rectifications, I am going to call them Rectification Resolutions. All were prepared on the instructions of Dato' Azhar?

J: Yes.

S: After the SPRM came to the office?

J: Yes.

S: After the SPRM asked for a BOD Resolution to authorize transfer of money out of the company?

J: Yes.

S: As a reactive manoeuver, as an afterthought manoeuver, Dato' Azhar told you better get a Rectification Resolution done?

J: Yes.

[1704]The defence thus maintained the inferences that may be validly drawn are as follows:

(a) the documents to disguise the utilisation of the RM170m from SRC to PPC (D528 and D521) and the RM103m from SRC to GMSB to IPSB (P487) were prepared only in 2015;

(b) these documents appear to have been signed by Nik Faisal and PW42;

(c) DW8 confirmed that he signed the Turnkey agreement (D528) in 2015 on the instructions of Jho Low;

(d) PW57 also claimed that Nik Faisal was said to have signed the SRC letter (D531) on the instructions of Jho Low;

(e) it is likely that PW42 may have also signed the Turnkey agreement (D528) on the instructions of Jho Low;

(f) given this, it is not unlikely that the SRC letter purportedly appointing IPSB as its CSR partner (P487) was executed by both PW42 and Nik Faisal also as a disguise of the RM103m transactions that Jho Low had caused from SRC to GMSB, and then to IPSB and for the 'reversal' transactions, the MGR transactions and the February 2015 transactions;

(g) given the timing and circumstances of the preparation and execution of the ratification DCRs (P567, P568, P605 and D606) the preparation of the same were part of efforts being taken to 'cover up' the transactions after the WSJ publications (D771); and

(h) the preparation of D528, D531, P487 and the four ratification DCRs (P567, P568, P605 and D606) are part of the same efforts.

[1705]Interestingly, given these inferences suggested by the defence, it is then contended that the cause of the transactions is indeterminate, and the testimony of the investigating officer (PW57) is also in this respect referred to by the defence. The notes of proceedings on 23 August 2019 — PW57 thus records:

> S: ... Now jadi soalan yang saya kemukakan sebagai kesimpulan, Encik Rosli, pertama kali kita sangkakan mungkin Nik Faisal sahaja buat benda ini, untuk mengambil tandatangan Datuk Suboh. Mengguna berkali-kali. Hanya menghantar menerusi email?
>
> J: Ya.
>
> S: Now dengan perkembangan baru, Nik Faisal punya tandatangan juga digunakan berkali-kali, ada banyak lagi permutation apa yang berlaku sebenarnya di office SRC?
>
> J: Ya.
>
> S: Banyak permutation, siapa yang buat angkara ini. Pertama, kita boleh katakan Datuk Suboh, kita boleh buat kesimpulan, Datuk Suboh tidak terlibat kalau ada forgery sedemikian. Dia tak terlibat sebab dia as a director and a signatory was asked to sign, he signed, ya? Kedua, Nik Faisal tidak dapat lari daripada suspicion sebab beliau di dalam office SRC, seperti yang beliau harus ada, bukan?
>
> J: Benar.
>
> S: Benar?
>
> J: Ya.

S: Dan ada beberapa orang pegawai SRC yang berturusan di dalam pejabat SRC? A

J: Ya.

S: Ya, dari mana email tersebut, dia hantar, ya? Dan orang-orang ini juga menjadi suspek, siapa yang membuat lifting, cut and paste tandatangan tersebut. Sekarang kita tak tahu siapa yang buat, daripada Nik Faisal hinggalah kepada orang-orang yang lain. Terence Geh, See Yoke Peng, dan sebagainya. Ataupun ada lagi satu, kemungkinan Jho Low sendiri, kita tidak tahu, mungkin dia dalam office. Alright. Now Encik Rosli, possibility yang ketiga adalah Nik Faisal, dia buat benda ini tapi kadang-kadang tandatangan beliau sendiri, oleh sebab beliau outside KL, outside the country, beliau may give direction kepada seseorang dalam SRC buat seperti ini. Orang itu menjadi kuncu beliau. Ya? B C

J: Ya.

S: Bekerjasama dengan beliau. Hantar surat sedemikian. These are the 3 kinds of possibility. Benar? Kemungkinan? D

J: Ya, possibility.

S: Possibility yes. Dan possibility ini kita tidak rungkaikan apa dia kebenaran, sebab perkara ini tidak disiasat dari segi itu. I am not saying you fail. Dari segi itu, perkara itu tidak dirungkaikan dalam siasatan. Benar?

J: Benar. E

[1706]In other words, the defence is saying that there were a number of different probabilities on the cause of the transactions from SRC and GMSB vide the 16 soft copy instructions letters. The said transactions, inclusive of the RM42m subject to the charges could have been caused by, inter alia: F

(a) by PW42 and Nik Faisal whose signatures were not forged;

(b) by Nik Faisal who forged PW42's signature; or

(c) by Terrence Geh and/or See Yoke Peng acting on the instructions of Nik Faisal or on the instruction of Jho Low. G

[1707]Again I emphasise that I do not see why the cause for the RM42m transfers is said to be indeterminate. Any one of the above three possible causes painted by the defence is entirely consistent and consonant with the totality of evidence that Nik Faisal and Jho Low served the accused and sit comfortably with the narrative of the prosecution case on the complicity of the accused. That much is clear and for all intents and purposes beyond dispute. These transactions were effected to ensure sufficiency of funds in the accounts of the accused. Given that the accused would want to avoid his cheques being rejected for lack of funds, he would have inquired with any one of the three he had tasked with this responsibility on his account balances, which would have made him privy to the remittance of the RM42m from SRC. The argument that the cause is indeterminate is therefore absolutely flawed. H I

A Whether the CBT of SRC funds committed by others

[1708]The other transactions involving SRC and Jho Low are not subject to the charges before this court. Even if they were true, it does not mean that the accused was not involved in the transfers of the RM42m specified in the instant B charges. The totality of evidence has clearly established the complicity of the accused with the involvement of Jho Low. Jho Low being responsiblefor the other SRC and PPB Group transactions may also be consistent with his involvement in the transfers of the RM42m into Account 880 and Account 906 of the accused. But it does not in any manner absolve the involvement of C the accused. There are no multiple inferences. There is on the totality of the evidence in this trial only one irresistible inference — that the transactions on the RM42m, from SRC into his personal accounts, by the conduct of others such as Nik Faisal and Jho Low, were procured by the accused, for his own benefit. D

[1709]The defence further argued that evidence has also established that the CBT of SRC funds was committed by other persons. The evidence of DW14 and DW17 was that as at 26 January 2016 when the attorney general E announced that the IP on SRC's RM42m would be NFA (D780) the conclusion was the accused had not committed any criminal offence.

[1710]DW17 testified that after January 2016, the MACC had opened new investigation papers by which the MACC eventually recommended that other F individuals be charged in relation to the SRC fund transactions. This is consistent with the testimony of PW57 who stated that in 2016 there was a recommendation by the MACC to charge Nik Faisal and PW42 with CBT in relation to the RM42m transactions which now make up the CBT charges against the accused. G

[1711]In a letter dated 14 May 2018 (P692), the MACC requested the Immigration Department to blacklist and restrict the movements of among others, Nik Faisal, Jho Low, PW42, and Redzuan Adamshah, where the IP referred to in the said letter is Report 252/2015, which is the same IP for the H case against the accused. PW57 testified that in May 2018 the MACC issued a request (P695) through the PDRM (RMP) for Interpol to issue 'Red Notices' against Jho Low, Nik Faisal, PW42 and Redzuan Adamshah. A red notice is a request to Interpol for the law enforcement agencies worldwide to arrest the persons named therein. I

[1712]The request from MACC to PDRM (P695) states that Nik Faisal, PW42, Jho Low and Redzuan Adamshah were all business associates involved in the dealings concerning RM3.6 billion of SRC funds and they cannot be traced by the MACC. The document encloses warrants of arrest and charge

sheet for all the named persons and the warrant dated 22 May 2018 issued against Nik Faisal (P693) contains a charge against Nik Faisal for CBT of RM40m funds of SRC on 24 December 2014 committed jointly, pursuant to s 409 of the Penal Code read together with s 34 of the same Code. The reference to s 34 therefore meant that the MACC had concluded that Nik Faisal, Jho Low, Redzuan Adamshah were involved in the CBT with 'common intention'.

[1713]The Red Notices dated 11 June 2018 issued against Nik Faisal and Jho Low as a result of the MACC's request (P696 and P697) contain particulars of offences by Nik Faisal, Jho Low, PW42 and Redzuan Adamshah being jointly involved in misappropriation of funds of SRC amounting to RM50m funds SRC which includes the RM42m which is the subject of the CBT charges.

[1714]The material particulars of the evidence outlined on the involvement of the persons were as described in the red notices, as summarised by the defence are as follows:

(a) Nik Faisal and PW42 were 'close business associates' of Jho Low;

(b) RM50m was transferred out of SRC to GMSB and to IPSB in December 2014 and February 2015 out of which RM42m was transferred into accounts of the accused vide a letter signed by Nik Faisal in three tranches of RM27m, RM5m and RM10m;

(c) Jho Low had no official role in SRC but was involved in giving instructions to transfer the money to the accounts of the accused from SRC;

(d) Redzuan Adamshah and one Toh Lean Seng were abetted by Nik Faisal and caused SRC funds of RM10m to be illegally transferred overseas; and

(e) the charge noted in the red notice alleges the commission of CBT of funds of SRC under with common intention, and given the contents thereof the red notices for all four individuals would have carried the same charge.

[1715]On or about June 2018, several emails were also issued at the behest of the MACC to several countries (P706, P707, P708, P709, P710, P711 and P712) for mutual assistance to arrest the named individuals. The information based on MACC's investigations was that Nik Faisal, Jho Low, Redzuan Adamshah and Toh Lean Seng were alleged to have committed CBT and money laundering offences under s 4(1) of the AMLATFPUAA in relation to the RM42m funds of SRC.

[1716]On 24 July 2018 the MACC requested for the passports of several individuals to be revoked by the Immigration Department (P700). These

individuals were all described as business associates who together with Jho Low were involved with dissipation of RM3.6 billion SRC funds. The individuals were Nik Faisal, Redzuan Adamshah and Toh Lean Seng. Terrence Geh was also noted as another business associate of Jho Low and was wanted by the MACC but had absconded.

[1717]The MACC investigating officer (PW57) confirmed (despite admitting that he did not pursue the evidence of the key involvement of Jho Low as disclosed in the BBM chats in exh P578) that the MACC's investigations was in accordance with the conclusions in the red notices, the offence outlined in the warrant of arrest (P694) and the contents of the emails issued (P706, P707, P708, P709, P710, P711 and P712) all of which contained the same conclusions that the RM42m were caused through CBT committed by Jho Low and others.

[1718]The defence refers to the Federal Court decision in *Low Soo Song v Public Prosecutor* [2009] 3 MLJ 36 where the following passage is especially instructive:

> [16] But in the present case, the appellant was charged alone for discharging a firearm in the commission of the robbery. *On the facts, it was the other person and not the appellant who committed the robbery*. He had snatched away PW3's gold chain and bracelet when she was sitting by the roadside outside the gate of her house. The offence of robbery was committed and completed outside the house during which time no firearm was discharged by the appellant. The appellant shot at PW4 whilst they were in the house. Since the prosecution did not invoke s 34 of the PC, it is incumbent upon the prosecution to prove that the appellant did commit the act of robbery and not the other person. From the evidence, there was nothing to suggest that the appellant had taken anything from PW3 or in the house. In fact the finding of fact by the High Court, which was subsequently affirmed by the Court of Appeal, vis a vis the act of robbery, clearly showed that the said act of robbery was not committed by the appellant. *Hence, the first two vital ingredients of the offence, that the robbery was committed by the appellant and that the appellant at the time of his committing the robbery discharged a firearm, were not proved against the appellant. The charge against the appellant could not stand. We agreed with the appellant that the conviction was against the weight of the evidence*. (Emphasis added.)

[1719]It is readily appreciated that in that case, the Federal Court clearly said that it was not proved whether the accused committed the offence of robbery. In contrast, the evidence against the accused for offences under the Penal Code, MACC Act and the AMLATFPUAA is plain and incontrovertible.

[1720]Neither is this case where this court is confronted with a situation where several persons had been jointly charged with common intention but it cannot

be established how the crime was committed. In contrast, the accused was not jointly charged with the rest, and there is no lack of evidence against the accused himself.

[1721]Again, in my assessment, the fact that these warrants of arrest mentioned Jho Low and a few others as committing CBT of the RM42m does not derogate from the other fact that the accused himself had been charged with CBT of the same RM42m. It cannot mean that the CBT charge against the accused is in any manner impaired. The one who stands accused of the seven charges before this court, including the three CBT charges, is the accused. The duty of this court at the end of the trial is to determine whether on the totality of the evidence, the prosecution has proven its case against the accused beyond reasonable doubt.

Whether Jho Low had control over SRC and GMSB

[1722]The defence argued that Jho Low had control over the funds of SRC and GMSB. This is not supported by documentary evidence, for he was not a signatory to the accounts of the two companies and the evidence of PW54 and DW42 is unequivocal in that only Nik Faisal's written instruction could be acted upon for transactions involving accounts of SRC and GMSB fund. Documentary evidence including the testimony of PW54 and the BBM messages (P578 and D650) shows that Nik Faisal was the only person who provided duly signed letters of instruction and electronic instructions through See Yoke Peng, the finance head at SRC. Further, as stated earlier, SRC and GMSB never disputed the AmBank's mandate to act on these instruction to-date.

[1723]Nevertheless — and this I emphasise is crucial — the testimony of the accused does make it absolutely clear that Jho Low, Datuk Azlin and Nik Faisal had all been tasked to ensure the sufficiency of funds in the personal accounts of the accused to enable the accused to make payments out of these accounts.

[1724]It bears repetition that given this court's finding on the accused's overarching control in SRC and as a shadow director and director (under s 402A of the Penal Code) and Nik Faisal's CEO role (later as director) and his mandate as an authorised signatory of SRC (as well as the mandate holder for the personal accounts of the accused), it is reasonable to infer that it was not improbable that Jho Low could have been involved in the orchestration of the inward and outward transactions of SRC funds (including the RM42m specified in the charges). Nevertheless, this does not in any manner detract from the finding of the complicity of the accused and Nik Faisal in the transfers of the RM42m from SRC to Accounts 880 and 906 of the accused.

[1725]The defence has not succeeded in raising any reasonable doubt on the prosecution case that the accused caused the misappropriation of the RM42m from SRC into the personal accounts of the accused. The weight of evidence on the knowledge and dishonest intention on the part of the accused in respect of the misappropriation found at the end of the prosecution case too remains unrebutted.

The accused did not know the transactions, balances and sources of his accounts because he did not manage them

[1726]A principal argument of the accused is that he did not know the monies in his personal accounts that he had spent on originated from SRC. His case is that the absence of knowledge is because of two primary reasons. The first is that since he did not manage his personal accounts, he did not know the balance of his accounts, let alone sources of funds, and he was not updated of the same.

[1727]Secondly, he believed that the funds in his accounts at the material time were donation monies from King Abdullah of the Kingdom of Saudi Arabia which the accused claimed to have been promised to him, and which he said had been remitted into his personal accounts every year since 2011. There was no reasonable cause to suspect otherwise to have warranted an inquiry. I will deal with this defence later.

[1728]I will first deal with the argument about the accused's lack of knowledge on the balances of his personal accounts because he did not manage them. As stated, the defence submits that the exact transactions in the accounts were not known to the accused because he was only generally told about the sufficiency of funds on an ad hoc basis by his principal private secretary, the late Datuk Azlin Alias.

[1729]To put matters in context, I have at the end of the prosecution case made the finding that the accused had the knowledge and dishonest intention to misappropriate the RM42m which were credited into his accounts on 26 December 2014 and 10 February 2015, which belonged to SRC, on basis of the summary of the following evidence, inclusive of subsequent conduct under s 8 of the Evidence Act 1950:

(a) in his sworn affidavit (P616A), which the accused affirmed on 23 February 2016, the accused confirmed his knowledge that the RM42m was from SRC, except that he affirmed that he did not know that it had been transferred through the two intermediaries, namely Gandingan Mentari Sdn Bhd ('GMSB') and Ihsan Perdana Sdn Bhd ('IPSB');

(b) Uma Devi (PW21) and Joanna Yu (PW54) from the AmBank Group both confirmed that the accused never during the material period or subsequently thereafter inquired or complained about the numerous and large transactions in and out of his three personal accounts, let alone lodge any police report or filed any legal suits on any alleged irregularities in his accounts. Similar testimony was given by Yeoh Eng Leong (PW47), from the bank's credit card division on the absence of any inquiries or complaints of unauthorised or unlawful usages of the accused's Visa and Master Card credit cards;

(c) the suspicious use of GMSB and IPSB as a layering mechanism in the transfers of the RM42m from SRC to the accused was without explanation, and primarily effected by Nik Faisal who was also the accused's mandate holder for the accused's personal accounts (including the two which received the funds) in the initial leg from SRC to GMSB and from GMSB to IPSB. The leg from IPSB to the accused's Account 880 and Account 906 was instructed by the accused's principal private secretary, Datuk Azlin. Both Nik Faisal and Datuk Azlin were in any event specifically identified by the accused (in his defence statement issued under s 62 of the MACC Act before trial) as having been responsible for the management of the accused's personal accounts in question;

(d) the accused's own direct involvement in the giving of the instruction to Am-Islamic Bank in exh P277 dated 24 December 2014 which he signed off on to transfer to Permai Binaraya Sdn Bhd ('PBSB') and Putra Perdana Construction Sdn Bhd ('PPC') on 29 December 2014 a total of RM32m from the accused's own Accounts 880 and 906. Thus based on the accused's own written instructions to the bank on 24 December 2014, upon the receipt of RM32m from IPSB on 26 December 2014 in his Accounts 880 and 906 respectively, only three days later on 29 December 2014, the exact amounts of RM27m was debited out of Account 880 and credited to the account of PBSB and RM5m debited out of Account 906 and credited into the account of PPC;

(e) the many BBM messages and 'chats' (in P578 and D650) between Joanna Yu (PW54) and Jho Low demonstrate knowledge on the part of the accused concerning the status and transactions involving his personal accounts. This is because these BBM conversations exhibit situations where Jho Low on-sent messages he received from the accused to PW54, or he sent copies of messages that he delivered to the accused on the account balances (after making the enquiry with the bank). There are also situations where Jho Low informed PW54 of cheques that the accused may be writing, on incoming remittances into the accused's

accounts, as well as on proposed transfers by the accused. And there are also situations where Jho Low contacted PW54 upon receiving instructions from the accused;

(f) the utilisation of the RM42m by the accused himself swiftly upon receipt, to repay PBSB and PPC the RM32m, and regularisation of accounts as well as enabling cheques be honoured and further issued for about RM10.7m. It is not reasonable for an account holder to spend without knowing the source of the funds;

(g) the accused himself was found to have overarching control of SRC and was its shadow director and a director under s 402A of the Penal Code; and

(h) despite expressing anger and shock upon being told by Dato' Dr Shamsul Anwar (PW37) of IPSB and Ung Su Ling (PW49) of YR1M on separate occasions in July 2015 about the transfers of the SRC's RM42m from IPSB into his personal accounts, the accused did not take immediate steps to clear his name; therewas no police report, no official statement, no complaints or any other attempt to even suggest that he did not know anything about the transfers, let alone that he could have been defrauded by irresponsible parties. Nor did he advise PW37 or PW49 to lodge any police report.

[1730]The defence submits that the accused in his testimony had emphasised that hehad no knowledge of the RM42m from SRC because his belief on the funds in his accounts from 2011–2015 was based on the circumstances that appeared to be prevailing for the last three consecutive years. These were:

(a) the general sense of funds in the Account 694 from 2011 to 2013 was based on the amounts indicated in the three Arab donation letters in D601–D603, periodic reporting of remittances from Jho Low relayed to Datuk Azlin and confirmations of Datuk Azlin prior to substantial cheques being issued;

(b) this led to about RM1 billion being utilised primarily through hundreds of cheques issued from the Account 694 with none being dishonoured for insufficient funds;

(c) the circumstances appeared to be the same in 2014 and 2015 and ultimately the cheques issued by the accused including from Accounts 906 and 898 in 2014 and 2015 were never dishonoured; and

(d) there was therefore no reasonable cause to suspect anything being different from what was believed to be merely a continuation of events since 2011.

[1731]This submission that the accused had no actual knowledge of the account balances and transactions throughout 2014–2015, including the SRC's RM42m transactions is according to the defence can be further inferred and supported by the following evidence:

(a) the manner in which the accounts were operated reflects that the accused would have not been told of the actual balances or transactions in these accounts; and

(b) reactive efforts were undertaken through subterfuge to ensure that the cheques issued by the accused were not dishonoured to avoid enquiries in the accounts to be made and actual transactions to be discovered.

[1732]The prosecution submitted that the accused had shown his dishonest intentions based on his own evidence and that of the witnesses called on his behalf.

[1733]Having examined the testimony of the accused and the other evidence in this trial, I find that this contention of the defence does not at all assist his case. I say so for several reasons.

Whether Jho Low was also responsible for the management of the accused's accounts

[1734]At the stage of the prosecution case, the accused in his case put to the prosecution witnesses that Jho Low was in cahoots with his associates and some rogue bankers in manipulating the accused's personal accounts. The suggestion was that these bankers unlawfully worked with Jho Low for this purpose, and that the latter should not have had anything to do with the personal accounts of the accused. This stance is generally maintained in his examination-in-chief at the defence stage.

[1735]However, when cross-examined, the accused testified unmistakably on the involvement of Jho Low in the management of the accused's personal accounts. First, Jho Low was responsible for monies going into his accounts. Secondly, Jho Low would also ensure that the cheques issued by the accused would be honoured. Consider the following exchanges as per the notes of proceedings on 22 January 2020 — DW1):

S: He was also sir, let's get to the bottom of this, he was also dealing with your accounts and monies going in sir?

J: As far as monies going in, yes.

S: And to ensure that at all times these cheques do not bounce sir, generally that was his role, you have said that sir?

J: Yes.

[1736]It is clear from the testimony of the accused himself that three individuals were responsible for ensuring that there were adequate monies in the accused's personal Am-Islamic Bank accounts to avoid rejection of his personal cheques. The three were Datuk Azlin, Nik Faisal and Jho Low. The following answers as recorded in the notes of proceedings on 8 January 2020 — DW1 cannot be any more definitive:

S: In fact, to the contrary, it is their job to make sure your cheques are honoured? Which is what your testimony is all about?

J: Yes, they wanted it to be honoured.

[1737]And this answer was repeated by the accused the day after, as per the notes of proceedings on 9 January 2020 — DW1, as follows:

S: And you recall yesterday you have, we have mentioned, just to put it all into perspective, that it was the job of Dato' Azlin, Nik Faisal and Jho Low to ensure there were sufficient funds in your account when you issue cheques?

J: Yes.

[1738]The submission of the defence too, as stated above, does not now deny the involvement of Jho Low as well as Datuk Azlin in the operations of the accounts of the accused, especially tasked by the accused to ensure sufficiency of funds in the accounts.

[1739]If the three individuals were involved in the management of his accounts, the question to be asked is whether they had been any communication between any of the three with the accused himself as the account holder on at least the balances of the accounts relevant to the sufficiency of the funds. Under such circumstances a reasonable inference must surely provide the answer in the positive.

[1740]At the prosecution stage, the defence put forth the suggestion that the accused left the operation of the accounts entirely to Nik Faisal, his mandate holder for the accounts. This was consistent with the defence that the accused had no knowledge of the SRC monies in his accounts because he did not operate the accounts nor was he updated on their balances and status.

[1741]In his testimony however, the accused agreed when cross-examined that the evidence of the BBM conversations (in exh P578) showed that Jho Low was in direct and actual communication with the accused himself, as well as through Datuk Azlin. The context of this communication was for the accused

to be apprised of the account balances before he decided to issue personal cheques for payments. This is recorded in the notes of proceedings on 9 January 2020 — DW1, as follows:

> S: And I am putting it to you that these BBM chats would show that Jho Low was, on some occasions, in contact with you to ensure that the credit card and cheques were all honoured?
>
> J: He was basically liaising with Azlin, basically with Azlin.
>
> S: Yes but on some occasions sir?
>
> J: Very few occasions, very few occasions.
>
> S: Very few occasions he liaised with you. And I am putting it to you, from these BBM chats, on occasions, you were also kept informed of the balances in your account, so that you'll be able to can gauge how much you can spend?
>
> J: Not directly, but through Azlin. I was normally informed through Azlin.

[1742]And in the notes of proceedings on 22 January 2020 — DW1:

> S: ... And you confirm, during this time you were on a few occasions dealing with Jho Low as regards to these accounts, regularizing those funds?
>
> J: I was dealing with the money coming in, yes.
>
> S: Yes, money coming in and generally on regularizing the cheques that were being issued.
>
> J: On the cheques he was dealing more with Nik Faisal and Azlin.

[1743]Further, in the notes of proceedings on the day after, 23 January 2020 — DW1:

> S: And when there were insufficient balance, Jho Low in particular and the other two had to make sure that your cheques were not bounced or dishonoured. That much they did.
>
> J: They did but they must always, should have done in a proper way.
>
> S: The proper way is whenever you spend sir, there were monies for you to spend. Because you didn't want to know anything else. Correct? Because you are too busy.
>
> J: Because I had requirements, ya.

[1744]There is no paucity of evidence of what effectively is an admission by the accused that for the purposes of managing the accounts, especially on ensuring sufficient funds in his accounts, Datuk Azlin would discuss the status of the accounts with Jho Low. This is in the notes of proceedings on 8 January 2020 — DW1:

S: It's late in the day but I'll try again. My question Dato' Sri is since Dato' Azlin, Nik Faisal and Jho Low were tasked with ensuring there were sufficient funds in your account, therefore Dato' Azlin would have discussed about the accounts with Jho Low?

J: Yes. But I do not know the nature of the discussion.

[1745]Probably having realized the implication of this admission of his knowledge that Jho Low was managing his funds in his private accounts,the accused did try to ameliorate this testimony by saying, when re-examined, that he only knew of Jho Low's involvement during this trial. It is difficult to accept this convenient reversal in position because this crucial caveat was never said in the many answers of the accused when cross-examined on the subject, as shown above. And as stated earlier the accused himself agreed that he had communicated with Jho Low when shown the evidence of the BBM chats.

[1746]The accused also attempted later to downplay the involvement of Jho Low by stating that Jho Low was dealing with Nik Faisal and Datuk Azlin in the operation of the accused's personal accounts, despite having admitted of himself having direct communication with Jho Low. Regardless, what cannot be now denied by the accused is that Jho Low was involved in the operations of the accused's accounts and that fact was known to the accused, without objection, if not with his consent. The accused can no longer say that Jho Low was a stranger to his private accounts.

[1747]In any event the accused admitted knowledge that Jho Low was in communication with Nik Faisal in relation to his personal accounts. This must mean that the accused had knowledge of the credits and debits in his accounts. Further, in the notes of proceedings on 8 January 2020 — DW1:

S: And you also know Jho Low was in communication with Nik Faisal with regards to your account. Correct sir?

J: Yes.

[1748]The accused repeated this in his belated attempt to distance himself from Jho Low, and admitted that both his principal private secretary, Datuk Azlin and his mandate holder, Nik Faisal told Jho Low to put in funds into the accused's private accounts. Surely the inference is they both had knowledge of his bank account balances. In turn this knowledge should inescapably be imputed to the accused, because the latter would issue personal cheques from the same private accounts. Thus, in the notes of proceedings on 8 January 2020 — DW1:

S: ... I am putting it to you sir that you were keeping Jho Low informed of the cheques so that he can bank roll and ensure there were sufficient funds in your account at all times. That was the purpose?

J: I disagree.

S: So are you, since you say you didn't say so, are you saying that Dato' Azlin or Nik Faisal will tell him so that he bank rolls your account? That's part of their job?

J: They are to ensure that there are sufficient monies in the account.

S: So it is also therefore they could be telling him so that the bank rolls your account or put funds into your account?

J: I don't know what they told him.

S: No, no, but let's get to the bottom of it sir. This is money in your account. You need to explain. You cannot just push it away. So all I want to know is, so they inform Jho Low so that he ensures there is sufficient fund. Is that correct? Otherwise there is no reason to tell him?

J: Most probably they informed him. Yes, most probably they did.

S: Yes, yes. So that he puts in the funds?

J: Most probably. I don't know.

S: You agree most certainly Dato' Sri, that Dato' Azlin and Nik Faisal couldn't have afforded to put in these funds?

J: Yes.

[1749]And further, this task of ensuring sufficiency of funds in the private accounts of the accused to ensure no disruptions in issuance of cheques by the accused unsurprisingly even involved communication by any one or more of the three with AmBank. The accused agreed in cross-examination that this meant Jho Low or Nik Faisal would be in contact with Joanna Yu (PW54). This is recorded in the notes of proceedings on 9 January 2020 — DW1:

S: So basically you can see Jho Low contacted Joanna to check of the balance and informed her to contact Nik to do the necessary transfers, so that you can write the cheque. Basically to ensure the cheque does not bounce. Basically to ensure there are sufficient funds in the account. Correct sir? You have to answer.

J: Yes.

...

S: You agree that this shows that there is a continued effort, Jho Low in communication with the bank and in liaison with Nik to ensure there were sufficient funds all time for you to issue the cheques? Correct sir?

J: Yes.

[1750]No less crucially, the accused even agreed that the bank could take instructions from Datuk Azlin and Jho Low provided it was confirmed with Nik Faisal, the mandate holder for the accounts. This is consistent with what Joanna Yu (PW54) had earlier testified, in that all instructions from Jho Low

were subsequently confirmed by Nik Faisal. This testimony further confirms the involvement of Jho Low in the operations of the accused's personal accounts including giving instructions to PW54 with the knowledge of Nik Faisal and of the accused himself. This is recorded in the notes of proceedings on 8 January 2020 — DW1:

> S: And I am putting it to you, before I just round up this area, that the bank correctly took instructions with your knowledge from Dato' Azlin, Jho Low, which instructions were subsequently confirmed in writing by Nik Faisal? All the instructions were confirmed by Nik Faisal in writing?
>
> J: If they were confirmed by Nik Faisal, he was the mandate holder. Yes.
>
> S: So that's fine.
>
> J: That's fine.
>
> ...
>
> S: Right. You agree as long as the bank acted on written instructions of Nik Faisal, they had the mandate to act on your behalf?
>
> J: Yes.

[1751]That it was the accused himself as the account holder who had given the responsibility to his principal private secretary, Datuk Azlin, his mandate holder, Nik Faisal and Jho Low to ensure funds were readily available in his accounts for his spending is made beyond doubt in the accused's own testimony,as recorded in in the notes of proceedings on 7 January 2020 — DW1:

> S: I put to you that from evidence that it was the job of Jho Low, Nik Faisal, Dato' Azlin, to make sure you had funds in your account. It was their job?
>
> J: They managed my account, yes, but to what extent Nik Faisal dealt with Jho Low, I had no idea.
>
> S: I am just putting it to you, if you say you don't know, you disagree. I am just putting it to you that it was that means you gave them the job, to Jho Low, Nik Faisal and Dato' Azlin to make sure you had enough funds in your account?
>
> J: But it must be from legitimate sources. I would never have asked them to do something illegal.
>
> S: We leave the legitimate source or not, whether legitimate, we'll come to. But for funding it, it was their role?
>
> J: Provided it comes from legitimate sources.
>
> S: But you agree you spent the money from so called illegitimate sources, you agree?
>
> J: I didn't know at the material time.
>
> S: But you agree you spent it?

J: I spent it, but at that time, at that material time saya tidak tahu duit tu dia datang daripada mana.

[1752]This contradicts the accused's own attempt to understate the extent of Jho Low's involvement. It is clear from this testimony that Jho Low was involved in ensuring the sufficiency of funds in the private accounts of the accused, and he would be in contact with Joanna Yu (PW54) to provide the necessary instructions to such effect. And these instructions would have been known to the accused. The accused here merely concerned with whether these instructions were subsequently confirmed with the mandate holder, Nik Faisal. If they were, he was fine with it. As such any further claim that he was not informed of the dealings in his accounts cannot be accepted.

[1753]Further, whilst the accused tried to limit the role of Jho Low to managing the incoming funds from the alleged Arab donation, it is common ground that the principal source of funds for the accused's personal accounts was the alleged donation. It has been stated at the end of prosecution case that the accused sought the assistance of PW50 of AmBank Group to open Account 694 in early 2011 precisely to prepare for the inward remittances of such funds. If Jho Low was managing that, it made perfect sense for Jho Low to be overseeing the account balances as well.

[1754]I should add that these are the accused's personal current accounts. They are not some investment account which could have been left to a fund manager to manage in his discretion where the terms may not even require regular updates be given to the beneficiary. Here, the accused, then the Prime Minister and Finance Minister of the country depended on the availability of monies in these personal accounts of his to be able to issue cheques which he had done during the period countless times to many and several payees involving very huge sums. It could not have been that the persons tasked with ensuring the sufficiency of the funds in these accounts did not apprise the accused on the account balances, so that the accused could proceed to write more cheques, based on the extent of the amount available, especially when a sizeable sum of RM42m was injected in two of his private accounts.

[1755]The accused even admitted that Jho Low had paid between RM80m and RM90m into the personal account. This is recorded in the notes of proceedings on 8 January 2020 — DW1:

S: He was also instrumental in paying into the account of the 80 or 90 million. Subsequently.

J: Yes, I learn about it later.

S: You said he was, you had mentioned that Jho Low, Nik Faisal and Dato' Azlin were tasked to ensure there were funds in your account.

J: Yes.

Whether any conceivable reason why those managing his accounts would not inform the accused of the RM42m

[1756]Despite admitting who were responsible in the operation of his personal bank accounts — the three whom he had identified — the accused was consistent in maintaining the narrative that he stilldid not know the inflow of funds into his private accounts as he did manage his accounts.

[1757]The argument of the accused is that his state of knowledge of the funds in his accounts from the years 2011–2015 was based on the circumstances that appeared to be prevailing from 2011–2013, and the general sense of funds in the Account 694 vis a vis the three Arab donation letters in D601 to D603, as well as periodic reporting of remittances from Jho Low relayed to Datuk Azlin and confirmations of Datuk Azlin prior to substantial cheques being issued.

[1758]According to lead senior counsel, there was therefore no reasonable cause to suspect anything being different from what was believed to be merely a continuation of events since 2011. The circumstances appeared to be the same in 2014 and 2015 and ultimately the cheques issued by the accused including from Accounts 906 and 898 in 2014 and 2015 were never dishonoured, just like about the RM1 billion being utilised through hundreds of cheques issued from the Account 694.

[1759]The defence therefore admitted that there had been some form of communication with the accused on confirmations of sufficiency of funds before he decided to issue cheques. This alone, as can be readily seen in the analysis below, already raises the inference that the account holder must have known or been informed about the remittance of RM42m from SRC. He was I repeat the accountholder.

[1760]The accused tasked them with the responsibility to help him manage the accounts and ensure the availability of funds in the accounts beforehe started writing any cheques. There is no logical reason for them not to inform the owner of the accounts about the balances on these accounts, and source of funds, in as much as there is no justification for the owner not wanting to know the same. What more if the owner, like in this case is the Prime Minister and Finance Minister of the nation, and where the cheques issued by the owner out of these accounts, namely Accounts 880, 898 and 906, as well as the earlier Account 694 were very frequent, and involving very large amounts, running into a staggering total of more than RM1 billion during the entire period between 2011 and early 2015.

[1761]The manner in which the accounts were operated does not, in my assessment, in this case reflect that the accused would have not been told of the actual balances or transactions in these accounts. Nor were the alleged reactive efforts undertaken (which the defence says through subterfuge) to ensure that the cheques issued by the accused were not dishonoured to avoid enquiries in the accounts to be made and actual transactions to be discovered. This theory of Jho Low being reactive and acted in subterfuge — which I find to be very short on substance, is discussed further below.

[1762]The totality of the evidence is more consistent with the version that the accused knew about these transactions but deliberately wanted him insulated from the efforts taken by the three in order to prevent any risk of public disclosure. After all, the source of the remittances into his accounts was claimed to have been from the donations by the late Saudi monarch and the Arab royal family was not public knowledge. I reiterate that the accused was the owner of these accounts. He tasked the three to manage his accounts. He spent monies out of these accounts. Any alleged reactive course of conduct or subterfuge was at all times undertaken to ensure there was sufficient funds for use by the accused.

[1763]There is no basis to the submission that these were done to avoid the accused knowing the true details of the transactions in his or other accounts. Nor could the accused, when cross-examined, offer a reason why they would want to conceal the RM42m remittance from him in his long testimony.

[1764]For instance, when questioned by the prosecution as to why Datuk Azlin or Nik Faisal would not, as the accused maintained, have told him that RM32m had entered into his accounts on 26 December 2014, the accused could not offer an answer. Thus, in the notes of proceedings on 22 January 2020 — DW1:

> S: Okay. And I am putting it to you sir, the person managing the account would have told you RM27 million, RM5 million, has come into your account on the 26th December.
>
> J: No, he didn't tell me about it.
>
> S: Why on earth sir, would the person managing the account keep as a guarded secret RM32 million entering into your account? Can you profess a reason sir?
>
> J: No, I can't understand.
>
> S: Sorry?
>
> J: I don't know why.

[1765]It is difficult to resist the conclusion that even the accused himself felt his version too incredible for him to offer a decent explanation at the risk of

falling deeper into the depth of incredulity. A claim of lack of knowledge of the key remittances in his multi-million account is on evidence nothing but a convenient fabrication, made even more irreconcilable with common sense considering his position as the Prime Minister and Finance Minister of the country at the time.

[1766]Again, earlier, in the notes of proceedings on 7 January 2020 — DW1, the following exchange is pertinent:

> S: Yes my question is very clear, Dato' Sri that are you saying that Nik Faisal and Dato' Azlin kept away from you the source of funding in your account? They kept it away as a secret?
>
> J: Certainly I didn't know the money came from SRC. I didn't know at all.
>
> S: Therefore they kept it as a secret from you?
>
> J: Yes.
>
> S: Why would they keep a secret of monies paid into your account?
>
> J: Because I would never have ever authorized money from SRC to my account.
>
> S: Dato' Sri that's not my question. Why would they keep it a secret from you?
>
> J: You have to ask them, why ask me?
>
> S: Yes, because it's your account Dato' Sri.
>
> J: I don't manage my account nor would I authorised SRC money.
>
> S: You never managed your account but you knew how to spend all the money, therefore you knew the source of funds. Agree or not?
>
> J: No, I disagress.
>
> S: Without knowing the source of funds, how can you spend? There is credit and debit. It cannot be debit, debit. I don't know credit.
>
> J: But there were monies coming in.

[1767]There is no logical basis why those managing his accounts would want to source funds from SRC if the accused forbade them from doing so. It is unthinkable that they would want to get the accused, the Prime Minister whom they served, into trouble. There is no evidence that that was the case either. Their task was to help manage the accounts and ensure sufficiency of funds to allow the accused issued the cheques.

[1768]Nor can the accused offer any reason as to why would Datuk Azlin, Ung Su Ling of YR1M (PW49) or Dr Shamsul Anwar of IPSB (PW37) get involved in the transfer of the RM42m into the accused's personal accounts. Thus, in the notes of proceedings on 22 January 2020 — DW1:

S: You also agree sir, that there is no earthly reason for Dato' Azlin, Ung Su Ling or Dr Shamsul to cause these funds to be transferred into your account. RM42million?

J: I never gave any instructions.

S: There is no reason for them too. You cannot vouch any reason.

J: I don't know.

[1769]The accused admitted that Datuk Azlin was one of those who managed his private accounts. This is also, as mentioned, in the defence statement issued by the defence under s 62 of the MACC Act before the start of the trial.

[1770]I accept the testimony of Ung Su Ling (PW49) who had earlier testified that Datuk Azlin was the one who instructed her to tell the MD of IPSB (PW37) to authorise the transfer of the RM42m from IPSB to the two accounts of the accused.

[1771]The accused claimed no knowledge of RM42m paid into his account in December 2014 and February 2015 although he said that his principal private secretarywas managing his accounts on his behalf. The curious thing however is that the accused testified that the late Datuk Azlin was a man of integrity but at the same time he reasoned that he did not know why Datuk Azlin did not inform the accused of the transfer of the RM42m into his two accounts.

[1772]It is significant to observe that the bank statements of the accused for Account 906 (P110) and Account 880 (P270) which received the RM42m recorded that the credit transfer of RM27m, RM5m and RM10m into these accounts all came from IPSB. Datuk Azlin must have immediately noticed that the RM42m which had been credited into the two accounts of the accused was transferred from IPSB. If he did not know about the RM42m and its source before then (which is unlikely) Datuk Azlin would have found out upon noticing the mention of IPSB in the bank statements of the personal accounts of the accused.

[1773]This is because there was no rhyme or reason for IPSB, being the usual recipient of CSR funds from YR1M, to be making funds transfers to the personal accounts of the Prime Minister.

[1774]Both the Prime Minister and his principal private secretary must under usual circumstances have been very alarmed because there was no information as to why IPSB would undertake such transfers into the personal accounts of the accused.

[1775]The accused had in any event spent the RM42m. And he did so immediately upon receipt thereof. Datuk Azlin has passed away. Now the accused said he was not informed by the person who was managing his accounts, a man whose integrity the accused did not doubt. There appears to be no reason why Datuk Azlin who was his principal private secretary would not inform him of the RM42m.

[1776]The main source of the funds in the earlier Account 694, and later the three Accounts 880, 898 and 906 was claimed to be the Arab donations. As the funds which purportedly came from Arab donations was fast running out in 2014 (especially after the return of USD620m to the sender in 2013, to be discussed later), it made no sense for those who managed the accounts not to inform the accused that funding would also come from SRC.

[1777]Of course, such updating would have been unnecessary if it was in fact a direction of the accused for the transfers from SRC to be undertaken.

[1778]There was in any event no suggestion, let alone evidence that the late principal private secretary to the Prime Minister was then defrauding the Prime Minister. Consider this, in the notes of proceedings on 8 January 2020 — DW1:

> S: And Dato' Sri you will confirm that Dato' Azlin is a man of integrity and you trust him implicitly, even until today?
>
> J: Yes. Yes.
>
> S: Taking the aforesaid, what I just told you, I am putting it to you Dato' Sri, that Dato' Azlin would have told you that RM42million was paid into your account in December 2014 and February 2015?
>
> J: I disagree.
>
> S: You disagree. But you would certainly agree with me that Dato' Azlin would have absolutely no reason to keep this payment reflected in your bank accounts, as a closely guarded secret from you?
>
> J: I disagree. I wouldn't know. He didn't tell me about the RM42million.

[1779]Further, a day earlier in the notes of proceedings on 7 January 2020 — DW1, the accused said much to the same effect:

> S: So it is your contention then Dato' Sri, that Dato' Azlin and Nik Faisal kept away from you the source of funding. Is it?
>
> J: That is between Nik Faisal and Azlin.
>
> S: No, I am asking you. It's your account.
>
> J: They managed my account. Yes.

S: Yes my question is very clear, Dato' Sri that are you saying that Nik Faisal and Dato' Azlin kept away from you the source of funding in your account? They kept it away as a secret?

J: Certainly I didn't know the money came from SRC. I didn't know at all.

S: Therefore they kept it as a secret from you?

J: Yes.

S: Why would they keep a secret of monies paid into your account?

J: Because I would never have ever authorized money from SRC to my account.

...

S: Yes, because it's your account Dato' Sri.

J: I don't manage my account nor would I authorised SRC money.

S: You never managed your account but you knew how to spend all the money, therefore you knew the source of funds. Agree or not?

J: No, I disagree.

S: Without knowing the source of funds, how can you spend? There is credit and debit. It cannot be debit, debit. I don't know credit.

J: But there were monies coming in.

...

S: But you would agree with me, Dato' Sri, you were the sole beneficiary of funds in this account?

J: Maknanya saya mengendalikan akaun in tujuan tertentu.

S: No, I am asking you a question you were the sole beneficiary. You benefited from the funds in your account. Not Dato' Azlin or Nik Faisal. This RM27million?

J: Yes, but that account was not for my personal use.

S: No, no, don't worry about all that. That's a different story but you benefited.

J: It went into my account without my knowledge.

...

S: I am putting it to you there's absolutely no reason for Nik Faisal or Dato' Azlin to hide the fact of receipt of this money from you. There is no reason.

J: I disagree.

[1780]The accused agreed that Datuk Azlin, Nik Faisal and Jho Low were involved in the operations of his private accounts. He said Datuk Azlin was a man of integrity. There was no reason for him to conceal information about the transfer of the RM42m into the accused's accounts. Yet the accused maintained Datuk Azlin did not tell him about it.

[1781]And in the notes of proceedings on 22 January 2020 — DW1:

> S: So basically the mandate holder, Dato' Azlin, can keep away from you, funds, large funds coming in and leaving your account, you don't find it shocking, correct sir?
>
> J: Yes.

[1782]Even when re-examined, despite the earlier stand of no knowledge of his own accounts, the accused confirmed that Datuk Azlin and Jho Low wereinvolved in the management of his accounts, although as mentioned the accused tried to say that he did not communicate with Jho Low as much. In in the notes of proceedings on 3 February 2020 — DW1:

> S: Now, but then you yet, you maintained, that you didn't have exact knowledge of the transactions of the value then how do you now correlate this? Say, you see, on one hand you are saying I did speak to Jho Low at a very on some occasions where you chat with him on money coming in. But you also maintained at least in your witness statement you were not told on the exact transaction of the exact amount. So how do you harmonize these two?
>
> J: On the accounts, basically I consulted Dato' Azlin. On the accounts.
>
> S: So the information that you got from Jho Low was not as detailed or...
>
> J: No, just generally whether the money is coming in or not. That's what I wanted to know.

[1783]The fact remains that, as confirmed again by the testimony of the accused, as the above demonstrates, that Jho Low and Datuk Azlin, apart from Nik Faisal the official mandate holder, did have contact with the accused on his accounts. The inference is therefore inescapable as it is overwhelming — that they or any one of them must have informed the accused about the balances of the accounts, including the remittance of RM42m from SRC into two of the accounts, so that the accused would be well informed on his issuance of personal cheques out of those accounts.

[1784]This is also consistent with the prosecution evidence on the BBM chats between Joanna Yu and Jho Low. As mentioned previously the testimony of Joanna Yu (PW54) in relation to the numerous BBM conversations (P578 and D650) between herself and Jho Low also established the knowledge of the accused of the banking transactions.

[1785]Notwithstanding, because the accused wanted to maintain his defence of absence of knowledge of the crediting of the SRC funds into his accounts, earlier when cross-examined he did insistthat he was not told of the remittance by those who helped manage his accounts, regardless of how incredulous the excuse is. And worse, for the sake of maintaining this claim, the accused even

testified that he was not responsible for the credits into his own accounts but only accountable for the spending of the monies.

[1786]This startling testimony is recorded in the notes of proceedings on 8 January 2020 — DW1:

> S: So it is your case Dato' Sri that as an account holder, you are not responsible for the credits into your account, but only responsible for spending the money? That's your case.
>
> J: Yes.

[1787]Despite his own testimony on the role of the three and the admission that they would be in contact with him on his accounts, the accused maintains that he did not know the RM42m came from SRC, in plain divergence from the evidence of his knowledge that I have stated. When asked with whom he would check before issuing any cheque, the accused said he would always check with his own principal private secretary.

[1788]This alone further confirms the communication which must surely have included information of the remittance of the RM42m, a significant funding for the accused to continue writing cheques out of the accounts.

[1789]It is simply unbelievable for one to have spent large sums of monies without knowing its source. The only plausible explanation is that the accused must have known that the monies, the RM27m, the RM5m and the RM10m as specified in the three CBT charges were from SRC and entered into his bank accounts (Accounts 880 and 906), as in fact reflected to have been transferred from IPSB in the bank statements (P270 for Account 880 in respect of the RM27m on 26 December 2014 and RM10m on 10 February 2015 and P110 for Account 906 for the RM5m on 26 December 2014).

[1790]The accused in his evidence testified that he assumed that Datuk Azlin had knowledge of his accounts, which is reasonable and unsurprising as the latter was tasked to manage the operation of the accounts. Irresistibly, the inference must be that Datuk Azlin would if nothing else, certainly have noticed from the bank statements of the accused of the transfers made by IPSB on that total sum of RM42m. I will discuss the matter concerning bank statements later.

[1791]Incredibly the accused testified that although he would check with Datuk Azlin whether he could issue cheques for a certain amount, he claimed not to have asked Datuk Azlin about the balance in the relevant accounts. He stated that he never asked Datuk Azlin the source of the funds which entered his account because he merely assumed they were from legitimate sources.

[1792]Consider these answers of the accused, as in the notes of proceedings on 8 January 2020 — DW1:

S: And he will tell you based on your evidence. Yes, you can go ahead and issue those cheques. There are enough funds. Correct?

J: Yes.

S: Since this is your account and you are the Finance Minister, did you asked him, how come, where did this money come from?

J: I assumed there was sufficient money for

S: Did you ask him where these monies but you are going to issue came from?

J: No.

S: Sir, I will tell you something, if you keep avoiding, it's not very good.

J: Okay, never mind. That's what happened.

S: No, no, what happened you have told, but you must answer my question, not avoid my question. So did you ask him the source of the funds?

J: No.

S: You were not bothered where the funds came from?

J: Not that I was not bothered but I had faith in Dato' Azlin.

S: I know. I know. You had faith. But I am asking you this being your account, did you ask him where the funds came from? I would.

J: I didn't ask him.

S: You didn't ask him?

J: No, I just assumed they're coming from legitimate sources.

S: I am putting it to you sir that you didn't ask because you knew where the source of the funds was. That's the only explanation.

J: No, no, I disagree.

Whether the accused spent on the basis of his 'sense' that funds were available

[1793]Yet the accused, according to him, as the then Prime Minister and Finance Minister had no qualms of spending monies coming to his account without any query. There were many and frequent spending out of his accounts.

[1794]The amount totalled to hundreds of millions in Ringgit Malaysia. It is inconceivable that the accused, in that position was being recklessly irresponsible to not have been bothered about the source of the considerable sums of monies which continually funded his spending out of these accounts,

insisting that he assumed the funds were from Arab royalty donation when in 2014 the funding from that alleged source was depleting. He could not have been indifferent of the large funds entering into his account.

[1795]Furthermore, apart from the alleged Arab donation monies, another RM85m was paid into his account by Jho Low. And instead the accused placed his trust in his principal private secretary without being concerned with the source of funds.

[1796]The one and only explanation for this state of affairs is manifest. The accused must have known about the source and that the RM42m came from SRC. Whether it was his original idea is immaterial because he knew and went along with it, as subsequently further supported by his immediate utilisation of the RM42m.

[1797]That is not all. When the issue is further pursued by the prosecution, specifically as to whether the accused had to check with his principal private secretary each and every time before he wished to write a personal cheque, the accused even testified that the cheques were sometimes issued after checking with him but at other times, based only on a 'sense' that there were funds available in his accounts.

[1798]Thus in the notes of proceedings on 19 December 2019 — DW1:

> S: I need to know how this works. So, when you asked for the balance, when they don't tell you the balance
>
> J: They don't tell me the exact balance.
>
> S: Did you find it suspicious? Your account, you are asking for the balance to issue a cheque, and they don't tell you the balance?
>
> J: I had a sense there was enough money in the bank, in the account. Melainkan dia kata duit tak cukup dalam account, itu lain cerita.
>
> S: So you had a sense that there was money. Without knowing precisely how much money?
>
> J: Yes.
>
> S: And that's how helpful they were to you?
>
> J: It's their job to make sure there is enough money in the system.

[1799]This in my view, provides the clearest indication yet that in truth the accused must have known about the balance in his accounts at all material time and that that monies would be deposited into his accounts by Datuk Azlin, Nik Faisal and Jho Low. It is absolutely far-fetched to claim that one could actually decide to issue cheques on the basis of a sense that there was sufficient funds in

the accounts, what more if the amounts were sizeable and written on a frequent basis. The following exchange in the notes of proceedings on 19 December 2019 — DW1 further demonstrates the near illogicality of this testimony:

> S: So when you are at the PMO, Prime Minister's Office, you checked with Dato' Azlin. When you issue cheques from the house, who do you check with? Some of the recipient said that they saw you in the house and collected cheques. So who do you check with?
>
> J: No one. I just signed the cheque.
>
> S: You just signed the cheque without knowing the balance then? Or your sense of feeling there must be alright
>
> J: A sense there was money enough money in the bank.
>
> S: Very dangerous way Dato' Sri.
>
> J: I think in the house, wasn't all that big amount
>
> S: Well there was some big amount, millions was issued. 2.5 million was issued from your house, Habibul, you issued.
>
> J: There was enough money.
>
> S: That is not the issue. How did you know there was enough money? You see. You said with Azlin you checked in office ... in the house who do you check with?
>
> J: I didn't check. I issued the check.
>
> S: Because you knew the balance? You knew the exact balance
>
> J: No, I didn't know the exact balance. I had a sense there was enough money
>
> S: Nobody issues a cheque with a sense there is money Dato' Sri. Especially if you are the Finance Minister of the country, sorry. You are managing the purse of the country and then you say you issue cheques with a sense. That means money must be just floating
>
> J: No, there was substantial money in the account. That's why I issued cheques.
>
> S: But how did you know there was
>
> J: I know, I had a sense that the money was still there.

Whether the accused was told about his bank balance accounts

[1800]The accused maintained that he was never apprised of the exact balance in his accounts. He would enquire from Datuk Azlin on an ad hoc basis prior to issuing big cheques. Why the accused never wanted to find out the balances in his accounts despite issuing many cheques appears perplexing.

[1801]I have discussed that the accused's contention that Datuk Azlin had kept information on the actual balances and sources of funds away from the

accused is difficult to believe since the accused himself could not offer any possible reason for the same whilst the accused maintained that his late principal private secretary was a man of integrity. The accused must have known about his account balances.

[1802]To be clear, the accused's testimony is that he had no problem with not being told of the actual balance by Datuk Azlin. But the accused also said that his accounts would not have been overdrawn if he had been told the actual balances (but significantly none of his many cheques was dishonoured). This again begs the question why the accused, like other account holders did not ask for the actual balance from Datuk Azlin (or Nik Faisal).

[1803]It is patently obvious that just like the accused's claim that he never saw his bank statements and he was never informed of the balances, he never asked for such information because to admit of having that information would mean that the accused would have known the entry of RM42m from SRC into his accounts. The truth, as I have stated, in light of the evidence, and the irresistible inference drawn therefrom, is that the accused must have known about his account balances and was aware of the transfers of the RM42m from SRC into his personal accounts.

[1804]Furthermore, after all the accused did admit that he knew the specific sums he received in 2011, 2012 and 2013 were donations of RM2.6 billion. This knowledge is of course most logical, but is inconsistent with his position of never being told of his account balances and sources of funds which were paid into his personal accounts.

[1805]In the notes of proceedings dated 7 January 2020 — DW1:

> S: I'll come to that. We will let you answer everything that you need to answer for the court to evaluate. Before this transfer from your old account to the new account, before that, the three donations that came in, 2011, 2012 and 2013, do you know the amounts? At that material time?
>
> J: It was stated in the letters, yes.
>
> S: So at that material time, you had sight of the letters?
>
> J: I had sight of the letters.
>
> S: So in those letters it is stated all the sums were in American US Dollars. Do you know exactly what was the Malaysian equivalent at that material time that went into your account?
>
> J: Not exactly. Depends on the exchange rate at that time.
>
> S: Yes but do you know sir?
>
> J: Vaguely, vaguely.

S: How much? We are talking about the three ya.

J: I know. I returned around RM2.2 billion. About RM2.2 billion were returned, so I guess

S: Approximately sir?

J: Approximately about 2.6 billion. About that.

[1806]In addition, as stated earlier, despite the stand that he was never informed of the balances and sources but only whether there was sufficient funds on the few occasions he bothered to ask Datuk Azlin, the accused agreed that Datuk Azlin had specifically informed the accused that the alleged fourth Arab donation received in 2014 was RM49m.

[1807]Given the importance of this evidence, I produce again the relevant extract from the notes of proceedings dated 23 January 2020 — DW1:

S: Dato' Sri, were you informed when this 49 million ringgit came into your account from Black Rock and Vista Equity?

J: I can't be certain but Azlin may have informed me.

...

S: Alright. So sir you have actually in your witness statement said you knew of this Arab credit. So you knew of this credit between June and December? This 49 million?

J: Most probably Azlin informed me of it.

[1808]It is therefore manifest that the accused should have been put on notice in the period between June 2014 and February 2015 that if he issued cheques in excess of RM49m during this period then the fund in his account could not have been limited to the alleged fourth Arab donation of RM49m but from other sources including the RM42m from SRC. The accused must therefore have known this.

[1809]His assertion of having the 'sense' that funds were available during that period at the end of 2014 and early 2015 could not be based on the RM49m received pursuant to the alleged fourth Arab donation (as per the letter in D604) because as will be shown later the accused had spent RM136m (inclusive of RM49m) between June to December 2014.

Whether the accused's bank statements of accounts were kept away from him

[1810]Another position taken by the defence at the prosecution stage is that as part of this stance that the accused did not have knowledge about the operations of his accounts, the statements of accounts in respect of the three

Am-Islamic Bank accounts of Accounts 880, 898 and 906 had been deliberately kept away from him by Jho Low or Nik Faisal and others.

[1811]The defence sought to fortify its narrative that Jho Low had acted in subterfuge in his efforts to fund the accounts of the accused without the knowledge of the accused by contending that Jho Low had instructed Joanna Yu (PW54) to ensure that the bank statements of the three accounts were not sent to the accused. PW54 too admitted that for all the accounts of the accused, she had been instructed by Jho Low to keep the bank statements and not send them to him. Jho Low had also caused Nik Faisal to execute a letter dated 31 July 2013 (P57(28)) where instructions were given by Nik Faisal for the statements to be kept at the JRC branch and to be collected by PW54, Daniel Lee or one Noor Haslina Daud.

[1812]The defence argued that this letter was outside the authority provided to him by the mandate letters. P57(25) only authorised the bank statements to be given to Nik Faisal and there was no authority for Nik Faisal to nominate any other person to collect the same. Thus this reflects that these actions were not known by the accused. The accused maintains when cross-examined that he was never shown the bank statements.

[1813]However early in his cross-examination, the accused agreed with the suggestion of the lead prosecutor that there was in actual fact never a scheme to keep thebank statements or credit card statements away from him. The accused clearly agreed that the bank statements were with Nik Faisal, the accused's own mandate holder for the accounts, and that Datuk Azlin, the accused's principal private secretary had knowledge of the statements.

[1814]Thus, instead, it was on the accused's own instructions that the bank delivered the bank statements to Nik Faisal, his mandate holder. Thus in the notes of proceedings on 8 January 2020 — DW1:

> S: So you would see the train of events that as a result of you instructing the bank to deliver the cheques and bank statements to him, he in turn instructs the bank to keep those statements and cheque books with the branch and authorized some of the personnel from the bank to collect it and send to him. Correct sir?
>
> J: Yes.
>
> ...
>
> S: Yes. Therefore I am putting it to you sir you would agree with me, there was never a scheme to keep away the bank statement or the credit card statement away from you. With the facts you now know?
>
> J: Yes.

[1815]To give a complete background to this exchange, the following, on the same day is no less pertinent:

S: You know why I was jumping around for this was the evidence that was put before the court, perhaps without the benefit of looking at all you agree sir that firstly that you had authorized Nik Faisal to collect the bank statements. Correct sir?

J: Yes.

S: And Nik Faisal in turn with authority had told the bank to keep the statements and give it to him?

J: Yes, yes. It's true.

S: That's what the document says. And you say, and there's evidence that which you had testified that the bank statements were kept by Nik Faisal but Dato' Azlin knew about it. Correct sir?

J: I'm sure he had some knowledge of it. Yes.

S: Yes, that's what you say. I am just echoing.

J: True.

S: Yes. So in view of that, your statement that I had no reason to cause the bank statements to retain and pass it to Nik Faisal or I only recently came to the realization that the bank statements had been intentionally kept away from me from discovering the actual state of the new accounts is not correct? I am putting very politely. Correct sir? In the face of these documents?

J: I had reason.

S: In the face of these documents, this statement is not true sir. If you want to say it's true, go ahead.

J: Okay, I'll go along with you.

...

S: Which were kept by your mandate holder on your instructions?

J: They were kept on my instructions. Yes.

[1816]This contention of the defence that the bank statements were deliberately kept away from the accused is difficult to countenance. It is true that the BBM chats (P578) include a reference to Jho Low telling PW54 that bank statements of the accounts of the accused should never be sent to the accused. On the totality of evidence, I find that this was mentioned as an attempt by Jho Low and the accused to ensure that the accused would be insulated from the claim that he had knowledge of his own bank statements.

[1817]Evidence shows that the accused did not want to take possession of the bank statements of his own accounts. He appointed Nik Faisal as the mandate holder for these accounts which included the duty 'to collect bank statements'.

[1818]The accused agreed that both Nik Faisal and Datuk Azlin had access to the bank statements, and that the accused contacted Datuk Azlin and sometimes Nik Faisal to find out whether he could proceed to issue his cheques. The accused never said that Datuk Azlin had even once failed to provide to the accused the requisite information.

[1819]The accused denied that he contacted Jho Low for information of his bank account balance despite, as I have shown earlier, evidence to the contrary as what the BBM messages (P578) recorded. The accused never denied that the bank statements were kept by Nik Faisal based on his own instructions to AmBank and it is surely incontrovertible that the accused as the account holder himself could have easily at any time obtained the bank statements from Nik Faisal or AmBank such as from its Group MD (PW50) who attended to the opening of the first Account 694 at the accused's home in early 2011.

[1820]No one in this country — not even Jho Low of all people — could have deceived or denied the accused, then the Prime Minister and Finance Minister of the nation, from having access to his own bank statements, if the accused wished access to the same. The question of Jho Low concealing the bank statements from the accused is very superficial and does not arise.

[1821]It seems quite plain that it was the accused who wished to distance himself from his own bank statements so that he could claim (as he now does) no knowledge of the bank statements, the bank balance and the RM42m credited into his own accounts from SRC. On the contrary as he himself had tasked the three to manage his accounts and ensure sufficiency of funds, and given the other evidence referred to earlier, the defence has not been able to raise any reasonable doubt that the accused knew about the account balance and the transfer of a total of RM42m from SRC to his own Account 880 and Account 906. As has been stated earlier, the accused cannot deny knowledge of the contents of the bank statements when he himself authorised Nik Faisal to deal with the same. Matters dealt with by the appointed agent does not absolve the principal of liability. Furthermore Nik Faisal under his mandate could only conduct inter-account transactions under the mandate. It does not extend to dealing with transactions involving the transfer of funds from outside sources to said accounts of the accused, which could only be undertaken by the accused for which purpose knowledge of his bank accounts balances would have been essential. In any event, as has been stated earlier, an account holder is accountable for the transactions effected by a person appointed by the former for the purpose (see the Court of Appeal decision in *Yap Khay Cheong Sdn Bhd v Susan George a/p TM George* [2019] 1 MLJ 410).

[1822]In any event, as I have set out when examining the issue of the knowledge and dishonest intention of the accused in respect the CBT charges,

A the evidence of the BBM chats demolished the version that Jho Low only communicated with the accused very occasionally, when the former is shown to be actively in contact with the accused on matters concerning the sufficiency of funds in the accounts as well as when the accused ran into problems with his credit card purchases overseas. The many BBM chats (in P578 and D650) between Joanna Yu (PW54) and Jho Low thus even show actual knowledge on the part of the accused concerning the status and transactions involving his personal accounts.

C **[1823]**This is because these BBM conversations exhibit situations where Jho Low on-sent messages he received from the accused to PW54, or he sent copies of messages that he delivered to the accused on the account balances (after making the enquiry with the bank). There are also situations where Jho Low informed PW54 of cheques that the accused may be writing, on incoming remittances into the accused's accounts, as well as on proposed transfers by the accused. And there are also situations where Jho Low contacted PW54 upon receiving instructions from the accused.

E **[1824]**I cannot emphasise enough that in exh P277, the accused personally signed off on an instruction letter dated 24 December 2014 for Am-Islamic Bank to transfer on 29 December 2014 RM32m from his Accounts 880 and 906 to PBSB and PPC. As stated in the charges and confirmed by bank records and money trail evidence, the RM32m entered Accounts 880 and 906 on 26 December 2014. The accused must have been advised to effect the instructions on the date in question in the expectation that the RM32m would be credited into his two accounts.

G **[1825]**It is simply incredible if the accused claimed not have known about the flow of that much money into his personal accounts and without ascertaining its source, given that he personally wrote the instruction to debit out the same amount of money prior to receiving it.

Whether the accused knew the alleged Arab donations had been fully utilised before remittance of RM42m

I **[1826]**After returning the unutilised alleged Arab donation monies in 2013 (to be discussed further later), the accused still kept some RM162m in his Account 880. This was just before closure of the account, transferred in the same year into one of the three newly opened accounts, specifically that Account 880. When shown the statements of his own three personal accounts, the accused agreed that what remained of the alleged Arab donation monies in Account 880, Account 906 and Account 898 were almost entirely utilised as recorded in the respective statements of accounts in P270, P110 and P109.

[1827]In fact, what was left in September 2014 before the remittance of the SRC's RM42m beginning 26 December 2014 were merely the paltry sums of RM763.71, RM3,029.94 and RM839.50 respectively in the said accounts, as confirmed by the accused. In the notes of proceedings on 23 January 2020 — DW1:

> S: So, I would be correct to say the sum of RM162million that was transferred of the purported Arab donations had all been used up by September by your goodself, sir?
>
> J: According to the accounts.
>
> S: Yes?
>
> J: Yes.
>
> ...
>
> S: I'm putting it to you sir, that your contention that you were somehow harbouring in the believe that the Arab donations were still in your account when the RM42million, being the subject matter of the charge came in, is but a myth?
>
> J: I disagree.

[1828]No doubt the defence would argue that the accused was merely confirming what the statements of accounts show, and that does not mean he knew of the balances at the material time. I cannot accept this, given the evidence as discussed earlier (including to repeat only three, his communication with Jho Low and Datuk Azlin, the BBM chats and his own instructions to transfer RM32m in P277) that the accused must have been informed about the balances and funds availability for the purposes of cheques issuance, including on the remittance of the RM42m from SRC.

[1829]It is true, as highlighted by the defence that the subsequent and final alleged donation came in later in 2014, with the equivalent amount of £10million (about RM49m) went into Account 880 in early December 2014. However, only a sum of RM848,000 remained before the RM42m got credited into the accounts of the accused. But again, it is lame for the accused to now say that he did not know the balances at the material time. In the notes of proceedings on 23 January 2020 — DW1:

> S: After this RM49 million come into your 880 and your utilization of the funds for various purpose, what was left in your account was only 848 thousand. Correct sir?
>
> J: Yes.
>
> S: I'm putting it to you sir, therefore your believe that all funds, the funds of RM42 million, the subject matter of the charge that came after, are that from Arab donations, is clearly false?
>
> J: At the material time I was not aware.

S: You agree now, looking at this account sir, the RM49million, the four tranches that has come out, was almost entirely finished. Correct sir?

J: From the account, yes.

[1830]Even if the defence's contention that in fact there was RM5m (and not RM848,000) before the entry of the RM42m, the accused must have known about the entry of the RM42m to enable him to issue the instruction on 24 December 2014 (P277) for the bank to transfer out RM32m on 29 December 2014 to pay PBSB and PPC the exact amount which entered his accounts only on 26 December 2014.

Whether the accused retained Nik Faisal as mandate holder despite being removed as CEO by SRC

[1831]Tan Sri Ismee (PW39), the former Chairman of SRC had testified about his unhappiness with Nik Faisal as the CEO of SRC, stating that he was not satisfied with Nik Faisal on some governance issues. In particular was the failure of Nik Faisal to ensure the due submission of the company's audited financial statements to the Companies Commission of Malaysia (CCM).

[1832]This led to his removal as the CEO on 11 August 2014. But, as mentioned earlier, he was retained as a member of the board of directors of SRC, and even as an authorised signatory.

[1833]Particularly glaring though, was that the accused, despite having knowledge of SRC's governance concerns attributed to Nik Faisal, continued to maintain Nik Faisal as his mandate holder for all his personal accounts until the accounts were finally closed in 2015. There was absolutely no good reason for the Finance Minister who was as the MOF Inc the sole shareholder of SRC, to have retained a person removed by SRC as the company's CEO, to continue to be his personal mandate holder. In the notes of proceedings on 22 January 2020 — DW1:

S: And I think, I put it to you sir, you also Nik Faisal was your confidante, despite his financial mismanagement of the company you still maintained him as your mandate holder. This crook.

J: I did maintain him, yes. For a while, yes.

S: What for awhile? Until you closed your account sir.

J: Yes.

S: So despite his financial mismanagement of SRC, you still felt he will properly managed your, you had faith, you're already warned, so you have faith in him to manage your personal account sir?

J: Yes.

S: Must be.

J: Yes, because he was dealing more with Azlin at that time.

S: No, no, dealing with Azlin about your money. Not Azlin's money.

J: Yes, I know.

S: Yes, so you still trusted him?

J: Well

S: Must have sir.

J: Yes, well, I maintained him for a while, yes.

S: For awhile, I'm just saying until the account was closed, sir.

J: Yes, until closed.

[1834]Further, in the same day, in the notes of proceedings on 22 January 2020 — DW1:

S: ... When Tan Sri Ismee alerted or informed Dato' Azlin in August of 2014 that Nik Faisal was not a man of integrity when it comes to financial matters, did you find that statement by Tan Sri Ismee to be true?

J: In relation to SRC.

S: Yes. So you accepted Tan Sir Ismee's words through Dato' Azlin that in relation to SRC, Nik Faisal's conduct was wanting in integrity, in financial integrity, correct sir?

J: Yes, that's why I changed him.

S: At that stage, since he was already, his integrity was already in question, did you change your mandate holder?

J: No, I didn't.

S: That is, I'm putting it to you sir that is because he was literally working for you in SRC?

J: No, I disagree with that.

S: You expected him to have a, not a man of integrity in SRC but to be a man of integrity with your account, is that so sir?

J: Because the banks did not alert me there was anything wrong.

S: No, banks did not alert you but the Chairman of SRC had alerted you.

J: With respect to SRC but the bank did not alert with respect to my account.

S: Sir, are you telling this court that a man who has no integrity will have integrity in your personal financial dealings but not in SRC dealing? Are you splitting this man?

J: No, I expected if there was something untoward, the bank will inform me.

S: I am not talking about the bank. I am talking about this man's integrity as far. You found it acceptable still?

J: There was no report that he was doing something wrong with my account.

S: Okay sir. I am putting it to you sir, that Nik Faisal was your trusted lieutenant you had planted in SRC to siphon of funds for your personal benefit?

J: I totally disagree.

[1835]This is almost beyond comprehension. Unless, of course, as the prosecution submitted, in my view correctly, that Nik Faisal was the accused's trusted proxy in SRC who could be asked to perform transfers of funds as did materialise in the remittances of the RM42m from SRC into the personal accounts of the accused. After all, Nik Faisal as his mandate holder, was also tasked, together with his principal private secretary, Datuk Azlin and primarily Jho Low, to ensure funds were available in the accused's accounts.

[1836]I cannot but find that the actions of the accused was clearly consequential to his knowledge prevalent throughout the time his personal accounts were in operation. The accounts I reiterate were in any event admitted by the accused in his testimony to have been managed by those who were closely connected to the accused, namely the late Datuk Azlin, Nik Faisal and Jho Low. There is no rhyme or reason for them not to have informed the accused of the receipt of the large funds of RM42m from SRC through IPSB that allowed the accused to make more payments out of the accounts.

Whether the testimony of Dato' Rosman Abdullah (DW8) confirms role of Jho Low in managing accounts of the accused

[1837]The testimony of Dato' Rosman Abdullah (DW8), referred to earlier, further confirms the prosecution evidence in two other significant aspects. The first is that Jho Low was indeed involved in ensuring that monies were available in the personal accounts of the accused, and secondly, the transfer of RM32m from the accused accounts to PBSB and PPC on 29 December 2014 was not a reversal but a repayment transaction.

[1838]The witness was introduced to Jho Low by Datuk Azlin Alias who was a close friend of the former from secondary school. The witness, who was looking for an active role in a business undertaking was invited by Datuk Azlin to meet Jho Low at a London hotel in July 2011.

[1839]DW8 testified that subsequently, Cendana Destini Sdn Bhd, a company controlled by him, had on 9 March 2012 entered into a share sale

agreement to acquire the entire equity interest in PPB from Utama Banking Group Bhd ('UBG') for RM240m, which was completed only in 13 April 2015.

[1840]At the material time and pending completion of the sale, DW8 maintained that PPB continued to be under the control of Jho Low, via UBG. Jho Low was also then the group managing director of PPB. DW8 gave evidence that he did not then have a say in the running of PPB.

[1841]Thus he merely followed the request by Jho Low on the use of PPB and its subsidiaries to facilitate a flow of RM170m which the witness claimed was stated by Jho Low to be an advance from SRC for a contract that Jho Low was negotiating to be executed by Putra Perdana Construction Sdn Bhd ('PPC'), a subsidiary of PPB.

[1842]Jho Low had assured DW8 that the former would ultimately ensure that if the RM170m was not utilised for the proposed contract, Jho Low would effect a repayment and no liability would accrue to the PPB group. DW8 was initially concerned if Jho Low had wanted to use the funds of PPC, but he was assured by Jho Low that the funds would be from SRC, a company which DW8 knew little about, which he did not then know was government-owned.

[1843]The witness said the RM170m was repaid to SRC in two tranches. DW8 further gave evidence that the said contract (D528) mentioned by Jho Low, turned out to be a sham, and was concocted by Jho Low to cover the money trail.

[1844]DW8 testified that the RM170m was transferred by SRC into PPC via three tranches of RM35m on 8 July 2014 (P257), RM105m on 14 July 2014, RM30m on 8 August 2014. And significantly on the same day of 8 July 2014 the RM35m was credited into the account of PPC, it was transferred to its subsidiary, PBSB, and Jho Low gave instruction to DW8 to transfer RM27m from PBSB to the accused's Am-Islamic Bank Account 880 on the same day itself; and later on 10 September 2014 another RM5m was instructed to be transferred from PPC to the accused's Account 906.

[1845]The witness confirmed that he knew from Datuk Azlin that Jho Low had a direct connection with the accused. However, DW8 testified that Datuk Azlin never mentioned that the accused was in need of funds. DW8 also agreed that Jho Low referred to the accused as 'Boss'based on previous conversations and when Jho Low had asked DW8 to inform Jho Low once the requisite transfers of RM27m out of the RM35m into a specified account was done, as Jho Low needed to update 'Boss'.

[1846]That specified account was the accused's Account 880, which was according to DW8's testimony, only known to him later. He testified that he only knew that the Am-Islamic Bank accounts belonged to the accused and claimed to have been 'shocked' to learn of media reports alleging that the accounts were the former premier's during his four-day remand by the MACC in July 2015.

[1847]The examination of DW8 on the transfer instructions into the personal accounts of the accused is found in the notes of proceedings on 27 February 2020 — DW8:

> S: Let's move on sir. In fact Jho Low informed you that money from SRC were an advance from a contract that was to be signed?
>
> J: Yes.
>
> S: And Jho Low informed you that one of the recipients of SRC money was AmPrivate Banking 1MY. For a sum of RM27million?
>
> J: Yes, that's what the BBM message stated.
>
> S: And at this stage sir, you were also aware that this advance of RM27million would be repaid later?
>
> J: Yes, that is what stated in the BBM message.
>
> S: And on the same day, on the 8th July 2014, Jho Low asked you to inform him after the transfer of this RM27million to Am Private Banking 1MY was carried out correct?
>
> J: Yes.
>
> S: He asked you to inform him so that he could inform his boss.
>
> J: Yes, that's what he said.
>
> S: And when Jho Low mentioned 'boss' at that time, you knew that 'boss' referred to DSN
>
> J: Yes.
>
> S: And this sir, to be fair to you, you knew from the previous communications with Jho Low where he always referred to DSN as his boss?
>
> J: Yes.
>
> S: And Dato' you also knew from Dato' Azlin that Jho Low had direct contact atau 'hubungan terus' sir with DSN?
>
> J: Yes, that is what I mentioned in my MACC statement.

Whether the testimony of DW8 confirms the transfer of RM32m from the accused to PBSB and PPC is a repayment and not a reversal

[1848]The evidence of DW8 also corroborates the prosecution's case that the monies that were paid by the accused on 29 December 2014 was a'repayment' and not a 'reversal' as contended by the defence. During cross-examination, DW8 was referred to the Putrajaya Perdana Bhd reports and financial statements for the year 2014 (D661), specifically to para 17.2 at p 66. This is recorded in the notes of proceedings on 27 February 2020:

S: And now sir, I will take you to page 66. You agree these are the approved contents?

J: Yes, this is an audited account.

S: And I invite you to page 66. 17.2 sir

J: Yes

S: I am just going to read that so we are on the same page literally. 'During the year, the bank accounts in the group had reflected the following fund movements. PPC had received funds from a 1st, 3rd party amounting to RM35milion and transferred the same to PBSB in July 2014. RM27 million was then advanced to PBSB to the 2nd, 3rd Part in July 2014.' You see that sir?

J: Yes

S: Let's put some context to this. In view of the evidence that we now know, you agree that the 1st, 3rd party referred to therein is SRC?

J: Yes that's correct.

S: And the second 3rd party is DSN?

J: It's AmPrivate.

S: AmPrivate account, okay fine. We are not concerned with the other matters. I'll just take you to AmPrivate. Because the AmPrivate has got 3 types we will give the specific destination later when we go through the documents. Then sir, I take you to (d), D for Denmark, on the same page – In September 2014 PPC advanced additional RM5 million to the second 3rd party, i.e. the AmPrivate Account,

J: Yes.

S: And (f) — PPC and PBSB received funds amounting to RM5 million and RM27 million in December 2014 as repayment from the second 3rd party referred to in A and B?

J: Yes, that is what is stated.

S: You agree with me that this correctly reflects the movement of the funds and purpose of the funds?

J: Yes.

[1849]As such, the witness confirmed that the notes to the audited financial

A statements of PPB (para 17.2 of p 66 of D661) recorded the movements of funds in question. The account of the accused was in the notes referred to not by name but by the descriptions 'the second third party' as the recipient of the RM27m and 'the second third party' as the transferee of the RM5m.

B **[1850]**The same notes as confirmed by DW8, as the director responsible for the financial management of PPB as stated that the RM27m and the RM5m had been received from the second third party as repayment. The second third party was only identified by DW8 as Am-Private account which has been established as belonging to the accused. DW8 said that PPB wanted to take a C prudent approach in its financial reporting as the matter on the transfers involving the Am-Private accounts of the said second third party was then still under investigation.

D **[1851]**The witness was also referred to statements made to the MACC by Jho Low and a former PPB executive director named Jerome Lee Tak Loong, both of whom could not be located by the authorities to give evidence in this trial. They both stated that they played no part in the transactions and instead named DW8 as the one who had instructed the transactions.

E **[1852]**DW8 flatly denied this and claimed that Jerome Lee was Jho Low's nominee and maintained that all the transactions on the RM170m were done according to Jho Low's instructions. The witness maintained that he relied on Jho Low's representations to him on the nature of those transactions relating to F the advance of RM170m, which was said to be for Jho Low's own business dealings and ultimately towards full repayment of those advances.

[1853]The evidence of DW8 therefore has the effect of further confirming the prosecution case, given the corroboration on the evidence of Jho Low's G involvement in transferring monies into the personal accounts of the accused, as well as on the repayment of the RM32m to the PPB Group as initiated by the accused's own instruction letter dated 24 December 2014 (P277), as duly recorded in the audited financial statements of the PPB Group (D661). It bears repetition that the initial transfers of the RM32m by PBSB and PPC to the H Accounts 880 and 906 of the accused in July and September of 2014 had been fully utilised by the accused as shown earlier.

[1854]The accused could not possibly contend that he did not have knowledge of the SRC fund of RM32m that entered his two accounts since he readily I instructed for the payment of that same amount back to the PPB Group on 24 December 2014, two days before funds of the same amount found its way into his accounts, from SRC.

[1855]Further, the audited financial statements of PPB (D661) is a form of

written evidence reduced in a document, attracting the application of s 94 of the Evidence Act 1950, which reads:

> 94 Exclusion of evidence against application of document to existing facts
>
> When language used in a document is plain in itself and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts.

[1856]Section 94 is applicable to D661 because the PPB Group is required by law to record all its financial transactions in its annual financial report and the contents of the said report is thus conclusive proof of the transactions made by PPB. In the face of clear evidence in D661, I would agree with the prosecution that any attempt by the defence to give other evidence to contradict the relevant portion in D661 is not admissible under s 94 Evidence Act.

[1857]Furthermore, the suggestion of the defence that there was no evidence of any company loan arrangement between PPB or any of its two subsidiaries (PBSB and PPC) and the accused is of little substance because DW8 himself confirmed when examined by counsel for the accused that it was Jho Low himself who had effected the advances to the accused in Jho Low's own capacity as the controlling beneficial owner of PPB, and on his own behalf.

Whether the timing of the issuance of cheques compared to the actual account balances supports inference that the accused was unaware of actual balances

[1858]For completion I should address other submissions of the accused which further detail his contention of absence of knowledge of the actual accountbalances in his accounts and the various transactions therein, including the RM42m transactions.

[1859]It is argued that the evidence revealed that the three personal accounts had in fact gone into over drawn positions on numerous occasions in 2014 and 2015 as a result of cheques being issued when the account balances did not have enough funds. It is also not disputed that there was no overdraft facility in place for any of these accounts.

[1860]The accused also testified in his witness statement that he was unaware of the accounts being in over drawn positions and that he had issued cheques on the understanding that there was sufficient funds for the same. In cross-examination, the accused says he would not have issued the cheques if he was told of insufficient balances.

[1861]Thus, consider this exchange during cross-examination as recorded in the notes of proceedings 7 January 2020 — DW1:

S: Dato' Sri, you confidently issued and kept issuing cheques because Dato' Azlin, Jho Low and Nik Faisal made sure you had enough money in your accounts. That's why you confidently issued cheques until there were, the accounts were overdrawn. You agree or disagree?

J: If the accounts were overdrawn, maknanya saya tak tahulah jumlah sebenarnya. Saya...

S: Or you issued because you knew money will be paid or coming? I mean it's both.

J: No, no. I didn't know at that point of time exactly how much was left in the account. I issued cheques. It's up to them to alert me, you see.

S: Why would they want to make you issue cheques that will be dishonoured Dato' Sri? I cannot understand this.

J: I issued the cheque sebab ada request. Certain requirement.

S: No, no, that's not my question. Just answer my question. Sometimes, some things, you have to answer for your own good. There must be some logic. Why would they want you to issue cheques that will be dishonoured? What on earth?

J: Betul.

S: What is the reason?

J: They will try to make sure the cheques would not be dishonoured but I had no idea of the balance in the account so I kept on issuing cheques.

S: So you agree that you knew that they will be making sure your cheques do not bounce?

J: Generally speaking tapi they must be from legitimate sources. I will never condone them to take from illegitimate sources.

S: We leave that out, we are just talking about the funds. You've already made the point Dato' Sri, we all understand. We're just looking at the statement, I just want to understand, you issued the cheque even when overdraft because you were confident that they would make sure there were enough funds in your account?

J: Yes or they will tell me don't issue the cheque or don't cash the cheque.

S: Unless they were confident they can see to it, that monies can be transferred?

J: It's up to them to sort it out, you see. They can even advice me don't send the cheque out then I wouldn't do it, you see.

[1862]The defence also usefully listed out a comparison between the actual account balances and the dates on which cheques were issued by the accused from the Account 906 and Account 898 Account (in Annexure 10 and Annexure 11 of the bundle of annexures respectively).

[1863]I accept that these details show cheques of substantial amounts being issued and presented which caused the accounts to go into over drawn position,

the cheques being issued at a time when the accounts had insufficient balances or were already in over drawn position, and that the regularisation of accounts only made between one to three days after the cheques were issued and presented for payment.

[1864]The argument of the defence is that because the accounts went into negative balance it shows that the accused did not know the account balances when issuing the cheques.

[1865]I think this assertion is flawed. The overriding understanding, based on evidence, as is plain from the testimony of the accused himself, is that the three — Jho Low, Nik Faisal and Datuk Azlin would ensure the cheques issued by the accused would not be dishonoured. It did not matter if the accounts went into over drawn position because efforts would be taken to regularise the balances soon after, as did indeed happen.

[1866]After all, despite recurrences of over drawn balances in the three accounts none of the cheques had ever been rejected. In other words, it cannot be inferred that the accused did not know the balances on the basis of the fact that the accounts went into over drawn position.

[1867]In my judgment, the fact of the overdrawn positions did not mean the accused had no knowledge of the account balances. The overdrawn positions did not actually matter because the accused was assured by the role he had assigned to Jho Low, Datuk Azlin and Nik Faisal that his personal cheques would not be dishonoured. On the evidence, as long as the accused was assured that the cheques would never get dishonoured, the many and various overdrawn positions became secondary. To give substance to the assurance that the cheques would not get rejected for lack of funds, the accused must also have been comforted by being apprised of the account balances, including the remittance of the RM42m from SRC through IPSB. The knowledge of account balances provided assurance to the non-rejection of his cheques.

Whether the RM32m transferred into the accused's accounts were for the accused

[1868]The defence further submitted that the entire December 2014 transactions reveal that the RM32m from SRC was not even utilised by the accused and was in fact channelled through his Accounts 880 and 906 to enable Jho Low to record a zero position in the PPB's financial statements. The defence also asserted that circumstances reveal that the instruction in P277 could not have been executed by the accused and was in fact forged by Jho Low to carry out the reversal transactions.

[1869]The attack on the authenticity of the signature of the accused on P277 is significant because P277 is one of the key pieces of evidence showing knowledge of the accused of at least RM32m (out of the RM42m) from SRC. This is because P277 is the instruction by the accused to Am-Islamic Bank dated 24 December 2014 to transfer RM32m from his accounts to PBSB and PPC on 29 December 2014.

[1870]It is an impossibility for the accused to have given the specific instructions in P277 for the transfer of that large amount of money if he did not have funds to transfer. And it bears emphasis that RM32m did enter his Account 880 and Account 906 from SRC (through GMSB and IPSB) on 26 December 2014.

[1871]There are two points of attack advanced by the defence here. First, the RM32m benefitted not the accused but Jho Low. Secondly, the accused's instruction in P277, which this court finds as an important evidence which shows specific knowledge of the accused on the remittance of RM32m, was forged.

[1872]On the first point, the defence highlighted that the RM32m is after all part of the RM170m from SRC. The purpose for the funds to have been transacted out of SRC in December 2014 was to enable Jho Low to fund the accounts of the accused, in turn to cause onwards transactions which reflect the return of the RM32m (RM27m plus RM5m) from Account 880 and Account 906 back to PBSB and PPC respectively to reverse the earlier transactions from PBSB and PPC to the same Account 880 and Account 906.

[1873]The defence added that RM30m from the RM32m was subsequently sent back to SRC to reflect a return of all of the RM170m which is said to have been transacted out of SRC and utilised by Jho Low. Ultimately this enabled PPB Group to reflect a zeroized balance in its group audited financial statements (D661).

[1874]This argument is not valid. The transactions may have been orchestrated by Jho Low to allow PPB achieve a closure on the treatment of that sums of monies which were debited out of its subsidiaries' accounts. But it does not and cannot change the finding that this court has earlier established that in this trial the return of the RM32m (received in the accounts of the accused in July and September 2014 from PBSB and PPC) to PBSB and PPC on 29 December 2014 is not a reversal transaction.

[1875]Instead it is a repayment exercise. This repayment was made possible by the transfer from SRC of exactly RM27m into Account 880 and RM5m into Account 906 on 26 December 2014, as specified the CBT and money laundering charges.

[1876]This is clearly because the transfers on 29 December 2014 to PBSB and PPC were made to pay back the earlier transfers of the exact amounts from PBSB (RM27m) and PPC (RM5m) to the same accounts of the accused on 8 July and 10 September of the same year of 2014. Even the audited financial statements as referred to earlier recorded (D661) the transactions as repayment of the advance by the two entities in the PPB Group to the accounts of the accused, as confirmed by DW8.

[1877]Further, I need hardly add that evidence plainly shows that the advance of RM32m when received in Account 880 in July 2014 and Account 906 in September 2014 of the accused had been utilised to regularise the accounts of the accused and used for paying personal expenses of the accused.

Whether the instruction in P277 is a forgery

[1878]The second point is the allegation that the signature of the accused on the instruction letter in exh P277 is a work of forgery. According to the defence, based on the BBM chats (P578) following Jho Low's request for the transfers be made to PBSB and PPC, on 24 December 2014, PW54 told Jho Low that the transactions would be outside the mandate of Nik Faisal. PW54's suggestion that the same be effected by way of cheque payment could not proceed as Jho Low said the cheque book was with the accused who was then in Hawaii.

[1879]PW54 then agreed to accept a scanned copy of a letter which Jho Low said he would get the accused to sign. At 11am on 24 December 2014, PW54 emailed an initial draft instruction letter to effect the transfer of the RM27m and RM5m from Account 880 and Account 906 to PBSB and PPC respectively. Because PW37 of IPSB was overseas (which delayed the movement of funds from IPSB to the accused's accounts), the draft was amended the value date from 24 December 2014 to 29 December 2014. The final draft was emailed from PW54 to Jho Low and back to PW54 within minutes (between 1600 and 1616 hours on 24 December 2014). PW54 ultimately conceded that she never received a hard copy of P277.

[1880]The defence submitted that the fact that there was no cheque utilised and that the events transpired at a time when the accused was in Hawaii reveals that he was not in the know. The accused was in Hawaii, and attended a golf game with then President Barack Obama in late December 2014. However,

due to floods that hit the east coast of Malaysia, he decided to cut short his holidays and return to Malaysia, and on or about 24 December 2014 he would have been in transit back.

[1881]However, in my view, the fact that the instruction in P277 was drafted by PW54 and discussed with Jho Low does not negate the inference that the accused signed on the document in P277. Indeed, it was prepared for the very purpose of obtaining the signature of the accused.

[1882]When PW54 asked about the transfer being made by a cheque payment (naturally to be signed by the accused) Jho Low explained the accused was in Hawaii. This shows the extent of Jho Low's involvement in the management of the accused's accounts which necessitated him being aware of the movements of the accused.

[1883]Further, the fact that the mode of cheque payment was mooted shows PW54 and Jho Low did not exhibit efforts that keep information on the transactions away from the accused. And given modern technology on electronic communication it was nothing improbable about Jho Low being able to procure the signature of the accused who was then in Hawaii or any other location, within even four minutes. In any event because the accused was overseas, a written instruction to the bank like in P277 was the only solution acceptable to the bank, who could not have possibly accepted a copy of signed cheque from the accused.

[1884]Furthermore, P277 on the face of it carried notations that the transactions were 'confirmed' by Krystle Yap (DW2), and although DW2 in her testimony denied ever confirming the transactions in P277 and merely forwarded the same to the JRC Branch on instructions of PW54, the bank did accept the instruction in P277 and executed the same based on its internal processes. And again, as queried by the prosecution, who would have the audacity to forge the signature of the Prime Minister? This has never been answered, let alone satisfactorily, by the defence.

[1885]The accused testified that he was shown P277 when the MACC took his statement and he confirmed his signature thereon based on the fact that the signature looked like his. However, the defence now says that he was at the time unaware of the matters such as the unavailability of the original instruction letter which were only subsequently led in evidence revealing the circumstances of how P277 was generated.

[1886]The investigating officer (PW57) testified that there was no denial by the accused with respect to the signatures of the accused which are found on the various documents shown to him including P277 during the statement taking

session. And it is undeniable that the defence never raised any challenge on the signature of the accused despite the documents having been delivered to the defence under s 51A of the CPC well before the commencement of trial nor mentioned anything to such effect in the defence statement of the accused issued under s 62 of the MACC Act.

[1887]The prosecution did ask the accused whether the fact that RM32m had been credited into and later left his accounts via P277 not 'ring any bell?' The accused replied that the person who managed the account would have known. This is a curious reply because the issue is the accused himself had earlier confirmed in positive terms to the MACC that he signed and knew about the transfer of the RM32m from his personal accounts to the two companies.

[1888]I find this explanation by the accused lacking in credibility. It has a lot to do with the specificity of the instructions contained in P277. The transfer instruction in P277 which bears the signature of the accused (now disputed by him) as the accountholder giving the instruction to Am-Islamic Bank is especially significant in assisting this court assess the credibility of the testimony of the accused on this issue. P277 refers to a transfer out of two of the accused's personal accounts (Account 880 and Account 906) via two transactions to two companies, namely PBSB and PPC which have nothing to do with MOF Inc. And the amount in total was a staggering RM32m.

[1889]In my view, it simply defies logic for anyone to confirm making the instruction (say, like in this case, by the accused, to the recording officer of MACC) if the contents or subject-matter of the document or letter is so conspicuously unfamiliar to the person, who would under ordinary circumstances have out-rightly at the very first opportunity when confronted with the same, denied having anything to do with it. As it turned out later in his testimony, the accused conveniently claimed not to know anything about the transactions, including concerning PBSB and PPC.

[1890]I am reminded of the salutary observation of Abdoolcader FJ in the case of *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232 on proving signatures by circumstantial evidence, as follows:

> It is also contended on behalf of the 1st appellant that P17A is documentary hearsay and that the handwriting and signature therein must be proved to be that of the 1st appellant. The signature or handwriting in a document may be proved by circumstantial evidence if that irresistibly leads to the inference that the person in question must have signed or written it (*Baru Ram v Prasanni AIR* 1959 SC 93) and *a document can also be regarded as evidenced by its contents and the internal evidence afforded by the contents can be accepted as authentication as when it states facts and circumstances which could have been known only to the person to whom the authorship is attributed.* The execution or authorship of a document is a question of fact and

A may be proved like any other fact by direct as well as circumstantial evidence which must be of sufficient strength to carry conviction (*Krishnabiharilal v State* AIR 1956 MB 86 90–91) ... (Emphasis added.)

B **[1891]**It is thus unfathomable why the accused could have confirmed issuing the instruction in exh P277 — not only admitted that it was his signature but also sought to explain the transactions — when he was earlier examined by MACC. Unless of course it was indeed the accused's signature on P277, a document he had full knowledge of all along.

C Whether assertion of forgery on P277 and disputed shareholder minutes made at the prosecution stage

D **[1892]**The defence only manifested its contention that P277 and the relevant shareholder minutes were forgeries in the defence case. There were some suggestions made to a couple of prosecution witnesses but these were tentative and tangential. It was suggested to Uma Devi (PW21) the AmBank JRC branch manager that the signature on P277 appeared pixelated, and to Tan Sri Ismee (PW39) the chairman of SRC, that the signature on the disputed E shareholder minutes could have been 'engineered.'

[1893]The defence in its submissions at the conclusion of the prosecution case argued P277 and the disputed shareholder minutes could not be admitted as secondary evidence and there was no evidence to authenticate them. There was F no submission of forgery raised in the submissions of the defence at the end of the prosecution case, including during the oral submissions session.

G **[1894]**The accused in his testimony now said that he could not tell whether it was his signature or not. He said he did not know that the original of P277 and the other disputed documents were not available. He even insisted that only a handwriting expert could assist him to determine whether or not these were his signatures. This led to the application made by the defence for the document examiner expert be allowed to examine the exhibits in dispute, which included H P277.

The application for impeachment

I **[1895]**However, before the application for the expert to examine the disputed exhibits was made, and as the accused was being cross-examined, the differences in the answers provided by the accused on the questions whether he had signed the documents in dispute were highlighted by the prosecution. These concerned exhibits on shareholder minutes in P501, D534, D535 and the transfer instruction in P277.

[1896]There were three different statements given on different occasions by the accused. First in the statements recorded by MACC the accused confirmed signing all these documents and even offered explanations what these documents were about. But secondly, in his main witness statements read out in court, he said he had not seen and signed them and thirdly, even before he completed giving his evidence during examination-in-chief, the accused produced an additional or supplementary witness statements which now said that the signatures on these documents looked like his signature.

[1897]These inconsistencies, acknowledged by the accused led the prosecution to move this court for leave to initiate impeachment proceedings under ss 145(1) and 155(c) of the Evidence Act 1950 on the basis these were material and serious contradictions.

[1898]Thus, in the course of the cross-examination of the accused the prosecution moved this court to initiate an impeachment process against the accused. This revolved around the issue of the apparent contradiction in the answers given by the accused in his statements to MACC earlier and his testimony in court in respect of whether he had signed the said three MOF Inc shareholder minutes and the instruction letter on fund transfers to PMSB (transaction 1 from Account 880) and PPC (transaction 2 from Account 906) in exh P277. In particular the prosecution referred to the testimony now contains in the accused's supplementary witness statement.

[1899]The defence objected to this application, contending that there was no contradiction to justify the initiation of an impeachment process because the accused had given all the explanation why he had told the MACC recording officer that he had signed the four exhibits. This explanation according to the defence was stated in the witness statement as read out by the accused in examination-in-chief and in his answers to questions by the prosecution in cross-examination.

[1900]These included that the originals were not being shown when his statement was recorded, the fact that nobody from the relevant department in MOF responsible for the supervision of MOF Inc entities such as BMKD were called to verify these shareholder minutes, and that evidence from P42 showed that signatures could have been forged.

[1901]If pursued, the defence argued that the court would unnecessarily have to hear the same explanation as already given by the accused in answer to the prosecution in cross-examination, all over again. The defence also doubted the bona fide of this request, for the defence contended that this was to scuttle the

application then yet to be heard by this court moved by the accused to allow an expert to examine the authenticity of signatures on certain documents admitted as exhibits during trial.

[1902]In particular, the defence referred to the decisions in *Dato' Seri Anwar bin Ibrahim v Public Prosecutor and another appeal* [2015] 2 MLJ 293 and *Krishna Rao Gurumurthi & Anor v Public Prosecutor and another appeal* [2007] MLJU 888, which also applied the leading authority on impeachment, *Muthusamy v Public Prosecutor* [1948] 1 MLJ 57,where it was stated that impeachment should only be resorted to if there is unexplained contradiction.

[1903]I decided to first examine the documents said to contain the contradictory statements. The prosecution then showed me the highlighted portions of the earlier answers given by the accused to the MACC (redacted cautioned statements) in respect of the four exhibits and the answers given in the supplementary witness statement of the accused and repeated in this court in his testimony.

[1904]The apparent contradiction as submitted by the prosecution is that whilst the accused confirmed having signed the relevant exhibits to MACC, his supplementary witness statements as confirmed in court now say that he could not confirm that he had signed these exhibits and that he had told the recording officer that he had signed them because the signatures looked like his.

[1905]Having examined these statements, in my view they are not irreconcilable because the apparent change in stand by the accused in the supplementary witness statement as to whether he had signed the exhibits or not is, as set out earlier, accompanied by his attempt to explain during cross-examination, the basis for his earlier answers to MACC.

[1906]As such I find that there are no material contradictions or serious discrepancies between the two statements as highlighted vis a vis the four exhibits. There is therefore no justification to pursue the impeachment process against the accused in respect of this specific application by the prosecution.

[1907]The fact that I recognised the accused had proffered reasons to explain the contradictions hence rendering them not irreconcilable to justify the impeachment process does not mean that I accepted his reasons. That evaluation must be done only at the end of the trial. Which is now.

Dispute on authenticity of shareholder minutes and inconsistency of the evidence of the accused

[1908]This challenge, like against the instruction in exh P277, is a primary

contention of the defence. The key documents which bear what the prosecution say the signatures of the accused are the shareholder minutes executed by the accused, as MOF Inc. These documents being in effect the resolutions of the shareholder of SRC are crucial to the case of the prosecution, for it is argued that these shareholder minutes show the knowledge if not actual instruction of the accused in respect of matters concerning SRC.

[1909]In other words, these are necessary to establish the accused's control over SRC, especially in respect of the CBT charges. These included among others the applications for loans from KWAP, the transfer of funds outside Malaysia into accounts to be opened at specific banks, the appointment of its directors, its CEO, the establishment of subsidiary of SRC, as well as the opening of bank accounts at AmBank.

[1910]In support of this defence, the accused raised a number of assertions. First, the accused said that as the Prime Minister, Finance Minister and later advisor emeritus of SRC, he was not involved in operational matters. In other words, he also said he did not micro-manage the company. Thus he maintained he did not know about the matters stated in the shareholder resolutions, even though he agreed that the items mentioned in the shareholder minutes had all been performed. Nevertheless, the accused agreed that keeping an eye on the RM4 billion would not be micro-managing but he did not know the status because he was not so informed.

[1911]In fact in his answer when cross-examined by the learned attorney general, the accused said he was not sure whether he did actually sign the shareholder resolutions even though the signatures did look like his, and importantly even testified that he could not remember signing these shareholder minutes because any such signings must, according to him, have been first preceded by him receiving the relevant resolutions of the board of SRC which the accused claimed were neither given nor shown to him.

[1912]Yet, later in the cross-examination, the accused stated that he recalled having signed the shareholder minute in P510 dated 23 April 2012 on the proposed amendment to the M&A to introduce the new article 117 creating the position of advisor emeritus for the accused being the Prime Minister. When asked again by lead prosecutor later in cross-examination, the accused maintained his confirmation that he did not sign any shareholder minutes save for P510. This was accompanied by a letter from the accused as the Prime Minister to the board of SRC on even date (P512) to the same effect, given the provision of the M&A which required the approval of the Prime Minister before any amendments to the M&A of the company could be made effective.

[1913]And he said he did sign P510 even though it was not the original version based on the contents of P510. Nonetheless, when questioned again, the accused said that position of his was subject to the original being produced.

[1914]But when re-examined by his counsel, again another bout of inconsistency reigned, and this time the accused expressed preference to maintain what he had actually stated in the witness statement that he had denied signing P510.

[1915]The problem with this testimony — apart from its inherent inconsistency, that the accused never signed the shareholder minutes and never sent them to the board of directors of SRC for the directors to implement the resolutions of the shareholder minutes (evidence of control over the board of directors) is the question why did the accused even need to create this new article on the position of advisor emeritus? The accused merely answered, almost incomprehensibly, that the matter was up to the board.

[1916]It is imperative to appreciate that when the accused in the course of having his statements recorded by the MACC was shown the copies of the relevant documents such as the shareholder minutes and the transfer instruction in P277, he did not deny or dispute the signatures on these documents were his, and even in some cases offered explanation on what these documents were about.

[1917]Given such circumstances, and considering the forgery theory was only meaningfully and seriously pursued by the defence at the defence stage of the trial, there is no burden on the prosecution to disprove forgery as asserted by the defence.

[1918]Furthermore, in a criminal case, the onus of proving forgery is on the party who asserts it. The Federal Court in *Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd* [2017] 4 MLJ 697 ruled on the distinction on the onus of proof in a civil from a criminal case in the following terms:

> [60] It would pan out that the respondent, who was the plaintiff, had both the 'burden of proof' to make out a prima facie case as well as the initial onus of proof to adduce evidence to prove the claim. The onus of proof would only shift to the appellants if the respondent had made out a prima facie case. That remained so even though forgery was pleaded. 'Now, there is a great distinction between a civil and criminal case, where a question of forgery arises. In a civil case, the onus of proving the genuineness of a deed is cast upon the party who produces it and asserts its validity. If there be conflicting evidence as to the genuineness, either by reason of alleged forgery or otherwise, the party asserting the deed must satisfy the jury that

it is genuine. (Emphasis added.) The jury must weigh the conflicting evidence, consider all the probabilities of the case, not excluding the ordinary presumption of innocence, and must determine the question according to the balance of probabilities. In a criminal case, the onus of proving the forgery is cast upon the prosecutor who asserts it, and unless he can satisfy the jury that the instrument is forged to the exclusion of reasonable doubt, the prisoner must be acquitted' ...

[1919]Even his testimony as expressed in his witness statements is contradictory. In his main witness statement (PS-SB1), the accused read that he denied signing P277 because he did not know the original was not with MACC. But in his supplementary witness statement (PS-SB1A) he now said he signed P277 as he thought MACC had the original. In all situations the accused knew when shown P277 by MACC that it was not the original. Surely if he was unsure with his signature on that photocopied version he could have insisted on viewing the original or simply not confirm the same.

[1920]This reliance on the need for the original is tenuous. The accused instead confirmed to MACC he signed these documents including P277 which contents contained detailed reference to the transfer instructions to PBSB and PPC including the bank accounts of the accused's own Account 880 and Account 906 and those of the transferees.

[1921]A similar excuse was raised by the accused in respect of the shareholder minutes. First, he was not told that the originals of these shareholder minutes were not available. Secondly, he did not know the prosecution never established from anyone in the MOF Inc department or BMKD, and none was called to support the existence of these documents. Thirdly, testimony of the one other director of SRC (PW42) showed that his signatures on the transfer instructions of SRC funds could have been forged. Fourthly, evidence suggested that there could have been a scheme that involved cheating the accused. Fifthly, and this was made during cross-examination, the authenticity of the shareholder minutes is doubted because no director resolutions were sent to the accused to precede any signing of shareholder minutes such that the existence of such shareholder minutes would therefore be fabricated.

[1922]The prosecution said that it seems that the accused needed someone, an expert, to tell the accused whether a document which bears his signature is forged or not. In my view it is very reasonable to state that one should be able to tell whether one's signature is forged or not by looking at the signature and more importantly, since no two signatures of the same person could if handwritten be exactly identical, by reading the contents of the said document. For instance, if the document pertains to a matter which is absolutely alien to the person, such that he could not have conceivably signed the document then it is likely to be forged. The defence in fact during the prosecution stage

especially when cross-examining the former directors of SRC, PW39 and PW42 only raised the issue of absence of original, non-calling of the maker and lack of evidence on execution. The defence did not clearly then allege forgery.

[1923]In this case the prosecution submitted that the accused's attempt to call an expert document examiner to be an afterthought since the accused could have raised the defence of forgery much earlier. Very much earlier. He could have denied signing these documents when questioned by the MACC recording officer in 2015 and 2018 before he was charged in July 2018. Instead, as stated earlier, the accused confirmed signing and even provided explanation on those now disputed documents. The accused could also have mentioned this when the prosecution supplied the documents under s 51A of the CPC. These were mainly done 18 October 2018 (in relation to P383A, P385, D535, D534, P510, P501 and P277) and in January 2019 (for P530 and P497). The accused admitted he had seen these documents before commencement of trial. He said he had his doubts then but not to the extent they could have been forged. Thirdly the accused also did not include the issue of forgery in his defence statement served on the prosecution under s 62 of the MACC Act.

[1924]This defence of forgery is additionally riddled with contradicting testimony from the accused himself. His argument that he could not be sure about whether his signatures were genuine is extended to many other documents, because one of the bases for this assertion, as mentioned earlier, is that the originals were not shown to him.

[1925]But there are a number of occasions during cross-examination where his answers contradict his written answers read out during examination-in-chief. For example, when questioned in cross-examination the accused confirmed signing P57(25) (mandate letter appointing Nik Faisal dated 20 June 2013), P57(30) (letter dated 1 July 2013 specifying the three personal accounts of the accused to be handled by Nik Faisal) and P57(33) (letter dated 26 August 2013 which stated the alternative or coded name of the three accounts) and agreed they were genuine, and had knowledge of their contents. But when told by the prosecution that the accused had actually denied signing these very documents in his witness statements (answer to question No 243), the accused conveniently said he is not so sure now because he did not get to see the originals.

[1926]And on another document, P60(17), despite being a photocopy, the accused in his witness statement recognised as one signed by him. He even confirmed that for this document, he had signed the same even without being referred to the original.

[1927]It seems that the accused would deny knowledge of documents despite his signature appearing on them where admitting the same would implicate him vis a vis the charges against him.

[1928]The same ambivalent attitude was shown by the accused in respect of P60(5) which was also a mandate letter authorising Nik Faisal granted by the accused dated 10 March 20011. When a photocopy was shown by MACC during investigation, the accused admitted the same and when asked during cross-examination the accused again confirmed the matter, agreeing that he recognised the letter based on the contents and his signature. And this was despite the accused's evidence in his witness statement read out in court in reply to question No 185 that he was not sure if he had signed the letter. Unsurprisingly the accused then had to agree with the suggestion by the prosecution that the accused could conveniently confirm some photocopied documents but not some others.

[1929]This in my view suggests a convenient afterthought. This is especially considering that despite his assertion that he was not shown the originals of the documents that he now disputes signing, when shown the original of P530(3), the accused still insisted that he needed an expert to confirm that it was his signature even though the accused admitted that it looked like his signature.

[1930]On another occasion during cross-examination, when confronted with the assertion that PW39, the former SRC chairman had testified that the shareholder minutes all came from the accused, the accused answered that he needed to check if he had told MACC that he had seen and signed the documents. It is all very confusing as the accused himself could not recall what he had signed and that he contradicted what he had told MACC. And yet, in his own supplementary witness statement, the accused confirmed signing P501, D534 and D535.

[1931]Furthermore, the minutes of the SRC board of directors' meetings dated 13 September 2011 and 8 June 2012 (P498 and P502) clearly recorded in these board minutes that the board of directors had been furnished with the list of minutes of the shareholder as listed therein. This plainly means that the version stated by the accused to be untrue, as the board arrived at their decisions after having considered the shareholder minutes extended to them, as recorded in the minutes of the meetings of the board of directors of SRC.

[1932]At the same time, the accused confirmed in cross-examination that since it was also his stand that no prior SRC directors' resolutions were sent to him, the shareholder minutes must have been false or forgeries. In other words, since he denied receiving any SRC board resolutions, the shareholder minutes could not have validly existed. Which is consistent with his contention that he

A did not produce any shareholder minutes of MOF Inc. He continued with this version, in that these shareholder minutes ought not to have existed, and sought to explain that he was surprised when given copies of these a good few months before commencement of trial under s 51A of the CPC, claimed to have discussed the matter with his lawyers but agreed not to have lodged any B report to the police over any alleged forgeries. Even when the defence formulated its defence in its defence statement under s 62 of the MACC Act (which was issued one day prior to the start of the trial), the accused could have sent the documents to a document examiner expert, but this was not done. Neither did the defence statement allege any suspicion on the authenticity of C these shareholder minutes.

[1933]Yet later in the cross-examination the accused agreed that as the contents of the directors' circular resolution (DCR) of the SRC in P385 were D almost identical to the shareholder minutes of D534 and D535, this confirmed the existence of the latter. But he disagreed when the prosecution suggested the obviously logical that as the two shareholder minutes were attached to the DCR, the former must have come first even though all documents were dated on the same day of 17 February 2012. Then the accused agreed that since the E DCR and the shareholder minutes dealt with the approval to send almost the entire capital of SRC abroad, the DCR must have taken the shareholder minutes in D534 and D535 as genuine. This therefore establishes that the shareholders minutes (in this situation, D534 and D535) issued by the accused preceded the passing of the DCR (P385) by the directors of SRC. Thus it F shows, as found earlier at the end of the prosecution case, that the accused had overarching control over SRC. The defence's contention that the prosecution had tricked the accused in this cross-examination is in my view, but a trifling complaint since the questions were specifically framed and the exact documents shown to the accused.

G

[1934]The accused's insistence that he never received any SRC board minutes and never signed any shareholder minutes for MOF Inc. other than possibly P510 actually meant situations which are almost unreal and difficult to accept. H The key would be that if SRC board of directors required the mandate from its shareholder before undertaking any particular course of action, the accused's evidence that he did not issue any shareholder minute must mean that any such action could not have been executed by the board. This the accused agreed on. When asked if the investment of RM1.8 billion of SRC funds overseas would I have required the approval of the shareholder since this constituted the major capital of the company, the accused agreed this should have obtained the shareholder's approval. Maintaining his lack of knowledge, the accused claimed he was surprised when he got to know about it but despite that he did not make inquiries about it.

[1935]In my view, the prosecution's version is very much closer to the truth, if not the whole truth. In truth, the accused did not bother to inquire because it was the accused himself who issued and signed the shareholder minutes and had them handed over to the board of SRC for the latter to execute. It could not have been true that despite his involvement and intervention that helped SRC obtained the RM4 billion loan from KWAP, the accused did not show interest in the company subsequently, and instead said that he put his faith in the management which were made up of credible individuals. Especially since this lack of interest spanned over a six-year period. If, as claimed by the accused, no board resolutions came to the accused during the period, he would have known that the board of directors was for all intents and purposes not functioning. Whilst there was no evidence that there was any significant energy related investment during the period, there was no evidence the accused, despite his involvement earlier did anything to deal with the situation.

[1936]Not only that, during the period, neither did SRC itself raise any concerns with the Ministry of Finance or the accused himself. Either of its problems with the lack of investments and the funds being stuck outside jurisdiction or even on the missing RM42m from the company's coffers. Again, this is consistent with the narrative that the accused himself was in control of SRC. Worse, despite the publication by *Sarawak Report* and *The Wall Street Journal* in early July of 2015, alleging that the RM42m belonging to SRC had been deposited into the personal accounts of the accused, there is no evidence of any efforts by the accused to have them returned. Instead the accused said in court that he wanted to wait for the outcome of the investigation, and in any event, the press conference held by the former attorney general on 26 January 2016 which cleared the accused of any wrongdoing did not direct that any monies be returned by the accused to any party. Yet until today, conversely no action has been taken by SRC to pursue any recovery action for the missing RM42m, from the accused, or anyone for that matter. Because the accused had always been in control of the company.

[1937]This is despite PW37 and PW42 stating in court that they told the accused around the middle of 2015 that they were involved in the deposits of such funds (from IPSB) to the personal accounts of the accused, and despite the affidavit affirmed by the accused himself in 2016 professing knowledge of the source of the RM42m. The accused also now admitted at trial that based on bank statements and instructions shown to him, the RM42m originated from SRC. Yet there is no indication of any chance of the return of the RM42m.

[1938]It is unthinkable for the accused not to have made inquiries about the investments made by SRC or the status of the funds taken as the loan from KWAP despite his involvement earlier in obtaining the loan especially since the

A accused even said that the board of directors of SRC could have acted on forged documents given his denial of having signed the shareholder minutes.

[1939]The inescapable conclusion for the accused's apparent lack of action over this six-year period, the denial that he had issued the shareholder minutes, B in my judgment is that he knew what had happened as the accused did sign those minutes and having been in control of SRC and fully aware of the monies deposited overseas and the problems associated therewith, he deliberately not have the issues notified to or let alone addressed by the relevant authorities.

C

[1940]Evidence at the end of the prosecution case has established that actions taken by the board of directors of SRC were based on the instructions of the accused which were conveyed primarily through shareholder minutes such as P530 which were handed directly, usually by Nik Faisal to its chairman (PW39). It bears emphasis that both PW39 and PW42 testified that Nik Faisal, D then the CEO of SRC was the link between the directors of SRC and the accused.

[1941]It is also worthy of emphasis that the accused did admit to MACC when E his statement was recorded that he signed P510, D534 and D535 and only much later in this trial that the accused started to complain about the lack of original, among others. And as mentioned, the defence's own efforts to get an expert on document examination to testify was not pursued even after this court allowed the relevant exhibits be examined by the expert who did spend F two days to do just that on the disputed documents including P277, D534 and D535. On top of all that these documents were all subjected to extensive cross-examination by the defence.

[1942]And quite apart from all that, as pointedly suggested by the prosecution, G these are official documents for execution by the Finance Minister in the capacity of Minister of Finance Incorporated. It is difficult to believe that someone was able to perform the task of forging the signature of the Prime Minister on a MOF Inc related documentation and had them submitted to the board of directors of SRC for them to implement. There is not a hint of H evidence that this could have occurred.

[1943]The defence has failed to rebut the authenticity of these documents. The findings at the end of the prosecution case have failed to be rebutted or negated by the defence and that in any event, s 71 of the AMLATFPUAA and I ss 30(9) and 41A of the MACC Act would apply to override any irregularities in proving the said documents.

[1944]The defence also argued that the conflicting evidence by the accused on one of the shareholder minutes, P510 is minor and only to be expected given

the length of his cross-examination. I cannot accept this. There is no confusion. The accused could not have made such a mistake because P510 was specifically referred to the accused and the contents explained. The only reasonable explanation is that the accused did indeed sign P510 and actually had told the truth, only to recant in his re-examination, having appreciated the implication of his admission. The same explanation in my assessment obtains in respect of the inconsistency in his testimony in relation to his signature on P57(25), P57(33), P60(5) and P59(35)/35A) where he denied them in his witness statement but admitted the same in cross-examination. As highlighted by the prosecution, in cross-examination the accused was asked on those documents 'is that your signature'. It could not have been any more direct than this. Nor could the accused feign any worse than this.

[1945]All these inconsistencies demonstrate plainly that the entire evidence of the accused on his signatures on these crucial documents is nothing but a convenient afterthought.

The application to allow expert examine documents in dispute

[1946]Nevertheless, the accused whilst in the course of giving evidence in cross-examination applied to have the disputed exhibits examined by a handwriting expert. Specifically, the documents or exhibits that the defence applied to be made available for examination by its appointed expert were P277, P497(3), P497(4), P530(2)–(9), P501, D535, D534 and P510.

[1947]The prosecution opposed this application, arguing that this was an afterthought position taken by the accused, especially since these documents had been supplied under s 51A of the CPC well before the trial started. The accused denied this, among others, highlighting that the issue of the signatures had been raised in the cross-examination of PW38.

[1948]I decided that even if the basis for this application was an afterthought or a recent invention by the accused, this would not be a valid reason to bar the accused from leading evidence in his defence. Under the law, an accused in his defence is entitled to procure and lead any relevant evidence of his choice. Furthermore, it is settled law that even if a defence is not put to the prosecution witnesses, the court is still bound to consider the defence, however weak.

[1949]I am especially mindful of the following passage from the judgment of Edgar Joseph Jr SCJ in a landmark decision of the Supreme Court in the case of *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209; [1996] 1 CLJ 705, which reads:

> At this stage, we would interpolate to remark — though we are digressing somewhat from the point concerning the onus of proof — that the Judge went so far as to hold 'that the defence by its failure so to put such questions to the prosecution witnesses ought not to be allowed to raise such issues at the defence stage'. In this, he was clearly wrong, since it is settled law, that although a court may view with suspicion a defence which has not been put to the appropriate prosecution witnesses who might have personal knowledge of the points at issue, the court is still bound to consider the defence, however weak, and to acquit if not satisfied that the prosecution has discharged the burden of proof which rests upon it ...

[1950]Nevertheless, the weight to be given to this expert evidence, should it be tendered, including on whether the credibility of the defence of the accused is adversely affected by any afterthought, is for this court to determine at the end of the case. The evidentiary value of the intended evidence is an issue to be determined at the end of the trial.

[1951]This would ensure that the best evidence on the authenticity of the disputed documents is made available to this court. It is the duty of this court to ensure that the integrity of the trial process and the constitutional right of the accused to a fair trial is upheld at all times.

[1952]I therefore allowed the application for the examination of the exhibits but only to those referred to as disputed documents by the defence.

[1953]Further, in order to ensure that the examination of the exhibits did not interfere with the proceedings of this case, the defence was ordered to arrange for the examination by the expert to take place the week after, for a period of not more than two days, within the court premises, with representatives of the prosecution, defence and the court to be in attendance. The report by the expert must then be submitted to the prosecution in the following week.

[1954]Consequent to my allowing this application by the accused, considering the facts and circumstances of this application, I further ruled that this was a proper case for this court, and that it is essential to the just decision of the case to allow the prosecution to call rebuttal witness under s 425 of the CPC should it wish to do so, in relation to the evidence that may be given by the expert document examiner, should this expert be called by the defence.

[1955]Despite assurances on time given by the defence during oral submissions, upon which my decision was based, the defence subsequently sought for a revision with the timeline after having conferred with the expert who is based in Australia. He could only come to Malaysia the week after the one fixed and that the expert needed two weeks to prepare the report, instead of

one week as indicated previously. The court allowed this variation to the earlier order but emphasised that any further would not be acceptable, as it would delay the proceedings unnecessarily.

[1956]It should be noted that the expert had previously as part of the preparation by the defence already examined copies of the exhibits in question based on whichever documents the defence identified. However, his findings were only preliminary as the originals and the versions tendered in court were not available to him. Hence the request. So the expert was not totally unfamiliar with the documents.

[1957]However, a few days before the two-week timeline for the preparation of the report was due, the defence confirmed in a letter to this court as disclosed in court subsequently that due to some unresolved issues with the appointment of the expert by the defence, the defence did not wish to pursue this matter further. This means that the expert will not produce a report to the parties and that the expert would thus not be called.

Outcome of examination of P277 and other disputed documents by expert

[1958]Initially the defence appeared to be unflinching in its resolveto show that exh P277 was a forged document, to the extent of bringing in the team's very own expert document examiner, Dr Steven J Strach from Australia. The objective was to demonstrate the alleged falsity of several disputed documents, including this instruction to dated 24 December 2014 which bears the signature of the accused on the transfer of RM32m to PBSB and PPC from his accounts (P277).

[1959]Nevertheless, after the expert had attended the court premise for two days to examine the said disputed documents, the expert report was never presented before this court. The defence explained that an 'impasse has arisen relating to the terms of Dr. Strach's appointment' as stated in a letter dated 21 February 2020 from the defence to the court.

[1960]This was a deliberate decision of the defence not to adduce the expert report to disprove the genuineness of P277 and the other documents the accused disputed his signatures. The defence has decided to give up on this golden opportunity to call the expert to question the authenticity of the accused's signatures on P277 and other exhibits. This therefore does not progress the defence of the accused.

[1961]For completeness, I should add that there was no denial by the accused earlier is further affirmed by the investigating officer (PW57) in his supplementary affidavit dated 30 December 2019 that the accused had

positively and categorically identified his signature without reservation in his statement to MACC. This affidavit is in reply to that of the accused in respect of the latter's application for the relevant exhibits of the disputed documents be made available to his appointed expert document examiner for examination.

[1962]This interesting development, which had earlier witnessed efforts taken by the defence in filing a notice of motion to ensure their expert is allowed to inspect the original documents where the accused is disputing his own signature, the hearing of the said motion with arguments for a whole day which resulted in a favourable outcome to the defence, the full two days of inspection conducted by the expert, all amounted to nothing as the report was never produced before this court.

[1963]Hence, P277 and the shareholder minutes in P497(3), P530(2)–(9), P497(4), P501, D534, D535 and P510 can no longer be ruled inadmissible as their own admissibility was already determined at the close of the prosecution case. The failure of the defence to rebut the admissibility with the non-production of their expert report will now confirm the genuineness of these documents.

Conversion of ID499 to P499 further shows control of the accused over SRC

[1964]At the end of the prosecution case it was determined that certain decisions executed by the board of directors of SRC in its meeting following update by Nik Faisal included as documented in a minute of a meeting between the accused and Nik Faisal on 7 September 2011.

[1965]This was marked as ID because the defence then contended that the meeting never took place, suggested it was a fake, and the other party, Nik Faisal was unavailable to verify it did. I stressed however that this minute in ID499 was referred to in the meeting of the board of SRC on 13 September 2011 as recorded in its minutes in exh P498. IDD499 was in the possession of PW39 as the chairman of SRC who testified that ID499 was given by Nik Faisal.

[1966]The prosecution did state a qualification that ID499 should remain at it is if no further evidence came to light to change its status. And despite ID499 being only an identification document, this document was extensively referred to in the cross-examination of the SRC chairman (PW39) for two days and of the investigating officer (PW57) for three days.

[1967]Now, at the defence stage,when cross-examined, the accused plainly admitted to signing the minute that is ID499. In the notes of proceedings dated 22 January 2020 — DW1 it is thus recorded:

S: And will now show you sir IDD499. Just give me a minute sir. And IDD499 is one of the briefings by Nik Faisal to you sir, just two of you. This was the very early days sir. September 2011 just after the first loan.

J: Yes, that was his briefing.

S: Yes. Alright. And at the last page, last page, both him and you have just placed your signatures sir, correct?

J: Yes.

[1968]In re-examination the accused unconvincingly denied having seen ID499.

[1969]As such, I now rule that taking cognizant that both parties had conducted their case fully aware of the existence of ID499, which contents and signature were confirmed by the accused in his cross-examination, the same should be converted to prosecution exh P499. This evidence further confirms the prosecution case, including as elicited from its witnesses such as PW39 and PW42 that the accused exercised control of SRC through its board of directors by way the issuance of shareholders minutes and other directions conveyed through Nik Faisal.

[1970]In this regard I should perhaps make mention of the High Court decision affirming the power of the court in determining the admissibility of documents at the end of the trial. The High Court in the case of *Bank of Tokyo-Mitsubishi (Malaysia) Berhad v Sim Lim Holdings Berhad & Ors* [2001] MLJU 125; [2001] 2 CLJ 474 held:

> The counsel for the second and third defendants also submitted that all those documents are only marked as 'ID' and thus only for identification purposes and are not admissible evidence. I cannot agree with the counsel on that point. From the records of the proceedings, it seems that the plaintiff had attempted to produce all those documents as evidence but was objected to by the counsel for the second and third defendants. Thus, the court had to decide on the admissibility of all those documents at the end of the trial after hearing all the relevant circumstances of the case. At that stage of the proceedings, all those documents have to be marked as 'ID' first, but it does not stop the court from deciding on their admissibility at the end of the trial ie, during submissions stage. Section 73A(2) of the Evidence Act 1950 empowers the court to do so. The said subsection provides for the exercise of the power 'at any stage of the proceedings, having regards to all the circumstances of the case'. There is nothing to say that those documents cannot be admitted as evidence under s 73A(2) just because they have only been marked as 'ID'.

Whether Jho Low's efforts to ensure cheques not dishonoured was to avoid the accused discovering Jho Low's secret gains from related transactions

[1971]The defence argued that the efforts by Jho Low to cause various funds to be remitted into the accounts of the accused at a time when they were in negative position reflects that he was not told of the issuances of the cheques by the accused before-hand. The efforts are reactive after PW54 reports the state of the accounts.

[1972]The clear impetus was to ensure that the cheques do not get dishonoured so as to avoid queries from being raised and the actual transactions from being discovered. It is the submission of the defence that had queries been raised, Jho Low's gain from over RM200m SRC funds may have been revealed. This, according to the defence is corroborated by the steps taken by Jho Low to ensure that the bank account statements were not sent to the accused but in fact kept by PW54 and passed to him.

[1973]The defence contended that from the evidence and in particular the communication from Joanna Yu (PW54)'s BBM chats with Jho Low, PW49, Kee Kok Thiam and Jerome Lee, and the contemporaneous bank records revealed the following:

(a) PW54 would report to Jho Low on the balances in the accused's accounts and in particular instances when the accounts had gone into overdrawn positions as a result of cheques being presented for payment;

(b) at this point Jho Low would plead with PW54 to ensure that the bank does not dishonour the cheques;

(c) Jho Low then would cause funds to be remitted into the relevant accounts to regularise the same;

(d) the funds would be arranged through the facilitation of other individuals, such as Terrence Geh, PW49, Kee Kok Thiam and Jerome Lee; and

(e) Jho Low would also instruct Nik Faisal to execute letters to AmBank to facilitate efforts to ensure that the cheques are not dishonoured.

[1974]The accused too in his evidence in chief readily maintained that he was unaware of such actions of Jho Low, stating instead that this supports his position that he was not aware of the actual balances when he issued the cheques. And that there was thus no coordination or pre-meditated arrangement to fund the accounts prior to the cheques being issued.

[1975]Focusing on the material period, with the objective of preventing cheque rejections, Jho Low had procured the following funds to be remitted upon being told of the balances, in order to regularise the accounts:

(a) RM27m into Account 880 from PBSB on 8 July 2014;

(b) RM5m into Account 906 from PPC on 10 September 2014;

(c) foreign remittances of RM49m from Vista Equity & Blackrock;

(d) over RM12m in cash deposits; and

(e) RM10m from SRC (via GMSB to IPSB) remitted to Account 880 on 10 February 2014.

[1976]To put things in perspective, it is worthy of emphasis that the transactions in items (a) and (b) are the RM32m transferred from the PPB Group to the accused (as confirmed by DW8, without then knowing the identity of the account holder), which evidence has shown was utilised to regularise these accounts of the accused. The remittance of RM32m from SRC into the same Accounts 880 and 906 on 26 December 2014 was used to pay back the PPB Group on 29 December 2014. This was instructed by the accused himself in P277. Item (c) was the final tranche of the alleged Arab donation monies, in six foreign remittances in GBP into the Account 880 beginning June 2014 (D586), and item (e) was the transaction specified in the third CBT and the third money laundering charges. This has also been shown to have been used to regularize the accounts of the accused.

[1977]All these, according to the defence raised the inference that these actions of Jho Low were undertaken in subterfuge to keep up the ruse so that the accused would continue having the belief of the funds in the accounts being sufficient and were from Arab donations as was the prevailing circumstances since 2011.

[1978]In reference to the transactions on the remittance of the RM49m evidence shows that the BBM chats (P578) between PW54 and Jho Low reflect that for the RM49m remittance, prior to most of the above remittances, PW54 had reported to Jho Low that the accounts were in over drawn positions. Jho Low would then arranged for the remittances and instructed PW54 to ensure the cheques do not bounce. On this basis, the defence submitted that Jho Low's continued insistence for PW54 not to let the cheques bounce fortifies the position that Jho Low's actions are being taken through subterfuge to avoid cause for enquiries to be raised by the accused.

[1979]And to take one other example, which is the cash deposits of more than RM12m, contemporaneous evidence in the BBM chats (P578 and D650) between Joanna Yu (PW54) on the one hand and Jho Low, Josie (Jho Low's

personal assistant), Tan Vern Tat, Kee Kok Thiam and Ung Su Ling (PW49) reveals that the cash deposits of over RM12.3m were arranged only after PW54 reported that the accounts were in over drawn positions, all on the instructions of Jho Low. The defence asserted that again, at all times the sole intent was to ensure that the bank does not dishonour the cheques that had already been presented for payment. The timing of the cash deposits infers reactionary measure rather than pre-meditation. These reactionary acts support that the same was not pre-meditated and the deposits were done without the knowledge of the accused.

[1980]Even the letter from Nik Faisal, the mandate holder for the accounts, written to inform the bank about the making of cash deposits into those accounts are said to have been drafted at Jho Low's behest without the accused's knowledge. Thus, this exchange during cross-examination as recorded in the notes of proceedings dated 8 January 2020 — DW1:

> S: And I read you what your mandate holder or authorized person wrote:
>
> > I refer to the various cash deposits made into the bank account, maintained with AmIslamic Bank Berhad over the past several months, I wish to confirm that the said deposits made for the purpose of regularizing the balances of the account for cheques clearing had been arranged as there were insufficient time available to arrange for the bank transfers. I further confirm that the money sourced for such deposits are from Dato' Sri's personal funds and from his other personal accounts. I hope the above clarifies in relation to any query you may have in relation to the source of the deposits.
>
> So this is what is your mandate holder informed the bank that part of the monies were in fact your monies that were paid in to enable you to issue those cheques?
>
> J: Can't be, cannot be from my personal account.
>
> S: True or not? I don't want to debate on this.
>
> J: No, it's not true.
>
> ...
>
> S: And apart from you, I want to be fair. I'll put everything that is before the Court, I invite the witness to look at P638. Similarly Nik Faisal had on 20th of January 2014 written to the bank in reference to the three accounts, and I will take you straight to the second paragraph:
>
> > Please take note that given the respective schedules of the account holder being you and myself (including various international trips and meeting scheduled and other potential ad hoc travel requirements) I believe that there will be occasions where I may not be available to provide necessary transfer and remittance instructions to the bank. Pursuant to the above and the authorization granted to me arising from my appointment as the Authorized Personnel in relation to the Accounts, kindly note my nomination of the following representative to arrange urgent cash deposits into the Accounts where required for the purpose of, inter

alia, clearances of urgent cheques against my instruction:- Name: Kee Kok Thiam etc.

So two letters were issued to confirm by your authorized person, that cash were indeed paid in, and therefore I put it to you, you have knowledge sir?

J: I disagree.

[1981]Not only that. The defence also submitted that the extent of Nik Faisal's authority was confined only to the three mandate letters which PW21 and PW54 confirmed were in the banks records (P57(25), P57(30) and P57(33)). DW2 confirmed that the limit of Nik Faisal's authority would be as outlined in the respective mandate letters for the three accounts. The accused himself in re-examination confirmed that P638 and P57(23) were beyond the limits outlined in the three mandate letters.

[1982]Thus the issuance of P638 and P57(23) were beyond the authority as expressed in the mandate letters. In essence, none of those mandate letters authorise Nik Faisal to nominate a further party to deal with the accounts, to authorise cash deposits into the accounts or to specify sources of cash being deposited.

[1983]I observe that the evidence from the contemporaneous documents and records as well as the testimony of PW54 in respect of the remittance of the RM10m into Account 880 on 10 February 2015 (subject to the instant charges) as presented by the defence in commendable fashion in Annexure 6 of the bundle of annexures again demonstrate thatJho Low only procured the funds to be issued out of SRC after being told by Joanna Yu (PW54) on 5 February 2015 and 6 February 2015 of the over drawn positions. During the same period, Jho Low procured further cash deposits of RM1.8m to also be to ensure that AmBank does not dishonour the cheques. The defence says all these show the efforts were not pre-meditated but reactionary.

[1984]I accept that there is evidence for the other transactions, like the deposit of RM10m from SRC into Account 880 on 10 February 2015 (as referred to in the charges against the accused) would similarly demonstrate the steps taken were in reaction to information on the negative balance of the accounts and effected to avoid the cheques from being dishonoured, and where the key person making the arrangement for such purpose being Jho Low.

[1985]In my view however, it does not follow that this gives rise to the inference that the accused had no knowledge of the efforts taken to regularise the accounts. Any more than it does not suggest that he did not know about the balances or the sources of the funds for his cheque issuances.

A **[1986]**Based on evidence, it seems clear that Jho Low was principally instrumental in ensuring the inward transfers of funds into the accused's accounts but that the accused claimed to have checked more regularly with his principal private secretary on whether there were available funds before he wrote new cheques. Nik Faisal as the mandate holder acted more to formalise the requisite efforts.

[1987]What has also been established is that the accused knew from the task assigned to the three that the cheques that he issued would not be dishonoured. That is the overriding premise. He also testified that he communicated with Datuk Azlin, Jho Low and Nik Faisal on his accounts. This, as I have stated earlier, already gives rise to the reasonable inference that the accused, as the owner of the accounts must have been apprised about the status of the accounts, availability of funds, and sources of such funds.

[1988]These are basic facts about the operation of a current or checking account. One would surely want to know if there are sufficient funds in his account before issuing a cheque to avoid the adverse consequences of the cheque being dishonoured for lack of funds.

[1989]The accused said that Datuk Azlin would, if asked, indicate to him whether cheques could be issued by the accused. This implies that there were sufficient funds for the issuance. But at that point however, illogicality surfaces. The accused testified he did not at the same time find out from Datuk Azlin as to the exact balance of the account or the source of the funds, claiming instead he had faith in him. As shown earlier, the accused, in his strategy to deny any knowledge of the source of the RM42m, even says that he had a 'sense' that there were sufficient funds in the account. But the accused could not offer any rational basis how and why he had developed this 'sense'.

[1990]In my assessment, the accused must have known about the remittance of the RM42m from SRC. It is incredible for him not wanting to find out about the source of the funds in his accounts which enable him to issue many personal cheques. The three, Datuk Azlin, Jho Low and Nik Faisal were all on evidence in contact with him on matters related to the accounts. This must certainly have included the key information such as the remittance of the RM42m. Merely relying on a 'sense' that there were sufficient funds is astonishing.

[1991]As I have found, the basic premise is that the accused knew the cheques would not be dishonoured. It would have been less incredulous if the accused had explained that the 'sense' he was referring to arose from the knowledge that his cheques would not be rejected. Either way however it is impossible to believe that the accused was not in the know about the source of the remittance

of the RM42m from SRC. Again, I emphasise that this is not a deposit account. Here there are three personal accounts where the statements of accounts recorded many and frequent issuance of cheques for a total amount in the hundreds of millions in RM. And this is no ordinary account holder. Here the owner is the accused who at the material time was the Prime Minister and Finance Minister of the country.

[1992]This last point is significant. This sets this case apart from any other precedent cases. The defence maintains that it would be extraordinary for the Prime Minister to even agree, for example to allowing cash deposits of more than RM12m into his personal accounts especially after AmBank had informed that the same was being 'red-flagged' due to concerns on money laundering. But the accused was the chief executive of the country at the time. The powers of the office of the Prime Minister is vast and unmatched.

[1993]The contention that the timing of the remittances and cash deposits, including the preparation of the letters on cash deposits to AmBank, arranged by Jho Low to avoid the cheques from being dishonoured infers reactionary measure rather than pre-meditation, and thus without the knowledge of the accused is superficial. It had, in my view, nothing to do with the state of knowledge of the accused. Whether the steps taken were reactionary or a form of subterfuge or both at the same time would be of no concern to the accused, who had been assured that the cheques would not be dishonoured, and updated on the balances of the accounts.

[1994]The defence emphasised that Jho Low had no prior knowledge of the cheques that were to be issued and was merely reacting after the cheques were issued in a bid to ensure that the same were not rejected for lack of funds. But this is not true in all situations, as will be clear shortly. Nor can I agree with the submission that the accused had no knowledge of the transactions as the issuances of the cheques were not co-related to the transactions by Jho Low, in that it was improbable that the transactions by Jho Low were part of a pre-meditated arrangement with the accused. They were in my judgment co-related by virtue of the undisputed fact that the efforts by Jho Low were taken for one objective only. That was to ensure that cheques issued by the accused do not get dishonoured. Nor can I subscribe to the argument that it was more likely that Jho Low's continued efforts were to ensure that the cheques do not bounce so that the accused was not alerted to the actual balances and transactions therein.

[1995]In respect of the RM10m from SRC which went into Account 880 of the accused on 10 February 2015, the defence also showed that the total amounts that were in fact due by reason of cheques that had been issued from the end of January 2014 up to 6February 2014 was about RM7.39m. These

cheques were all issued at a time when Account 906 did not have sufficient balances and the presentation thereof would have led the account going further into over drawn position. In the end, the RM10m that was transferred into Account 880 on 10 February 2015 was used, as shown earlier, for the following three main purposes.

[1996]The first was to cover the over drawn balance in Account 906 (-RM2.33m) attributed to cheques issued between 30 January 2015 and 8 February 2015. Secondly, it was to cover the negative balance in Account 898 of RM3.4965m because of the cheque issued on 21 January 2015. Thirdly, on the balance amount of about RM4.169m (from the RM10m), the defence argued that the same could not have been known as the cheques that were issued after 10 February 2015 amounted to more than RM5.6m.

[1997]In fact, the issuance and presentation of the cheques again led to Account 906 going into negative position. Ultimately this was covered by the cash deposits which the BBM chats (P578) reveals that Jho Low only caused on the day itself, specifically, RM300,000 on 3 March 2015, RM707,000 on 4 March 2015 and RM400,000 on 9 March 2015.

[1998]Thus, the manner in which the cheques had already been issued prior to 5 February 2015 and thereafter revealed that the RM10m from SRC was utilised to primarily regularise monies which were already spent. None of the cheques were for urgent purposes. The defence argued that had there been a pre-meditation with the accused's connivance, the cheques would only be issued after the funds are remitted in. It was thus highly improbable that the accused knew of the transactions on 5 February 2015, 6 February 2015 and 10 February 2015 or even thereafter.

[1999]The defence therefore submitted that the accused could not have known of the intended transfers as these cheques were already issued and presented even before the date that Jho Low caused the said transfers on 5 February 2015 and 6 February 2015. And that the cash deposits could also not have been anticipated by the accused when the cheques were drawn out.

[2000]Again, more than everything else this shows the confidence of the accused that the cheques he issued would not be dishonoured. And none of the many ever got rejected given the efforts by others, principally Jho Low. But that confidence must have been premised on some assurance of sufficiency of funds, and the sources of the funds.

[2001]The accused cannot expect any rational person to believe that he could continually make payments in large sums out of his accounts, therefore correspondingly depleting the available funds and reducing the balance,

without any interest to find out the status on the balances and sources of funds for any prospective cheque payments. He must have known about the remittance of RM42m from SRC and let Jho Low to take whatever steps necessary to effect the requisite credits to ensure there was available funds to clear the cheques.

[2002]The fact that the cheques were issued by the accused a few days earlier, pushing the accounts further into the red does not therefore mean that he had no knowledge of the subsequent transfers from SRC into his personal accounts which after all served to regularise the accounts and in effect allowed further cheques to be issued.

[2003]As I have stated, given their role, and the necessity of the accused continuously issuing cheques, the accused must have been informed about the source of the RM42m funds as part of the assurance he obtained from Datuk Azlin, Jho Low and Nik Faisal that the cheques he wrote would not be dishonoured.

[2004]And to further deny the contention of the absence of knowledge, I cannot emphasise enough that the accused had personally written the instruction on 24 December 2014 (P277) to AmBank on the transfer of RM32m to PPB Group just before the exact sum arrived from SRC on 26 December 2014 into his own Accounts 880 and 906 (subject to the instant charges). Neither was the accused's conduct after the event — upon being informed about the SRC funds having entered his accounts, consistent with one who did not have knowledge of the source of the RM42m.

Whether Jho Low acted in subterfuge

[2005]Despite the accused himself taking the position that Jho Low, Nik Faisal and Datuk Azlin were all tasked to ensure that there were sufficient funds in the accused's bank accounts so that the accused's cheques would not be rejected, the defence posited the contention that Jho Low through trickery and deceit had paid funds into the accused's accounts in order to ensure that cheques would be cleared so as to avoid enquiries by the accused that would have led to the discovery by the accused of Jho Low's self-dealings and interests in the many transactions involving SRC, among others.

[2006]I have already rejected this theory which borders on being bizarre. There is no reason for Jho Low to put funds into the accused's account to avoid any cheques from being dishonoured by subterfuge. Because ensuring sufficiency of funds in the accounts of the accused was exactly the very role of Jho Low as tasked by the accused.

A **[2007]**Given the task of ensuring sufficiency of funds, once the Arab donation funds had been used up (assuming this belief of the accused that they came from King Abdullah was true — which I will discuss next), Jho Low had to put in funds from Jho Low's other sources to ensure the accused's cheques did not bounce.

B

[2008]Even if he genuinely believed the Arab donation story, the accused must have known that they were no more substantial funds in his accounts after he utilised the RM49m from the last transaction of the Arab donation in 2014. Thus, the factual matrix of the funding clearly shows that the accused was C aware of the entry of RM32m in July and September 2014 from PBSB and PPC and the RM32m in December 2014 from SRC and a further RM10m in February 2015. The accused was aware of the actual transaction by reference to the cheques issued which were in excess of the alleged Arab funds received by D him, such that the deposit of RM42m from SRC into Accounts 880 and 906 of his must have been known to him. The testimony of DW8 also states that Jho Low wanted to inform the accused once the deposit of RM27m from PBSB was effected on 8 July 2014, suggesting, unsurprisingly, that the accused would be apprised of remittances into his personal accounts.

E

Whether Jho Low acted reactively

[2009]The argument of the defence that Jho Low acted reactively is to suggest that Jho Low had no knowledge of the cheques issued by the accused and that F the two were not in communication, and that Jho Low was manipulating the accounts of the accused without the knowledge of the accused who allegedly did not know his account balance.

[2010]Even if the accused did not tell Jho Low in advance of his plans to write G large amount cheques, this does not mean that there was no communication between the two or that Jho Low acted in subterfuge. I emphasise that his key role is to ensure sufficiency of funds and that no cheques are bounced. Even if he had other secret deals, his commitment to the task for the accused remained H firmly intact. In any event, in my evaluation, the weight of evidence, notably from the testimony of the accused himself shows that there were many occasions where Jho Low was in fact not acting reactively to ensure the cheques issued by the accused were not rejected.

I **[2011]**In the notes of proceedings dated 9 January 2020 — DW1 recorded the following:

> S: The evidence sir, as shown in the BBM chats between Jho Low and Joanna Yu as you would have heard in court, reveals that Jho Low was kept abreast of your expenses or you issuing cheques etc. Correct sir? The chats revealed that?

J: That chats revealed.

S: And you recall yesterday you have, we have mentioned, just to put it all into perspective, that it was the job of Dato' Azlin, Nik Faisal and Jho Low to ensure there were sufficient funds in your account when you issue cheques?

J: Yes.

S: And I will, it's a bit tedious but I think we can do that this afternoon so that we don't have to deal with it the next time. I refer you sir, can the witness be given the exhibit P578? The first BBM chat that I wish to refer you, Dato' Sri is Tab, can I just first mention this is same as yours it's just that I bound it and mine is both sides so it looks thinner. This is Tab 9, you can see their tab with the number. Can you see that sir? Tag or tab. Can I invite you to Tab 9, page 18 of page 43? Which you will find in fine print at the bottom of the page. Have you found the page 18 of 43, sir? You've got it sir?

J: Yes, I think so.

S: I just want to let you know, this is established by Joanna Yu, both in examination in chief and cross-examination. This is the conversation between Jho Low and Joanna. And I invite you now to the time of the BBM chat which is at 4, sorry, 14:45. If you can sort of put a ruler or tab, can you find it sir? It is actually, 1, 2, 3, 4, 5, 6 item from top, 14:45.

J: Which one is that? Sorry, come again?

...

S: Yes sir. 2:45 and this you will see as I informed you sir. J refers to Jho Low and speaking to Joanna. That's not in dispute between the prosecution and defence. You can find that sir?

J: Yes, there's J and there's a Joanna.

S: Yes, so I am just informing so that you understand the conversation in the BBM. It's a conversation between Jho Low speaking to Joanna. And it says:

J: eagle 27 had left Permai enroute 1MY.

And we know eagle is just referring to RM27million that came out in evidence.

J: Pls chk;

J: RM27m;

J: Pls don't ask info re identity of sender;

J: Pls confirm receipt at 1MY.

That's your account's name. 880, because all your money go into 880.

J: ... and also updated figures?

J: it's NOT from PPC;

J: From a company called Permai;

A And then the important thing sir, if you just go down. It'll say:

J: RM27 had left Permai enroute 1MY Permai bank ac with Maybank to 1MY ambank;

J: Pls chk so I can inform mnr thanks.

B That's you. Can you see that sir? That's if you want to look at the time, that is 14:49.

J: Pls chk so I can inform mnr thanks.

Can you see that sir?

C J: Yes.

S: And then we just go down:

Joanna: will check;

J: Thanks; Joanna: 27 not in yet;

D Joanna: will monitor;

J: let me know when in;

J: MNR going to write cheques.

E So, the thrust of the conversation Dato' Sri, is Jho Low is informing Joanna to expect RM27million from Permai and he wants her to confirm that the money has come into your account 880. That's the thrust for that matter. And the reason he asked this is because MNR is going to write cheques. That is basically you are going to write cheques. You follow that sir?

F J: Yes.

S: And as you can see all this happened around 8th July. And now I invite you to account to P110, the July statement which shows and can you see that sir, 8th July, the RM27million in account 880, as Jho Low informed Joanna?

G J: 8th July.

S: Yes sir. You got it?

J: Is that

H S: Your 880 account is P270. On the 8th July, the day of the conversation you can see, RM27million as conversed by between Jho Low and Joanna had come into your account?

J: This shows RM10million.

...

I S: They're talking of 1MY. 1MY is P270.

J: No, you gave me the wrong one.

S: I am sorry, sir. I apologized. I apologized. It'll come to that. From here it gets transferred.

J: 8th July. Yes, RM27million.

S: And that RM27million sir, you can see below is debit transfer of RM20million. Can you see? On arrival on the same day there is RM20million debit transfer. Correct sir?

J: Yes.

S: And that debit transfer of RM20million goes into two accounts but I just want to show you one for present purpose which is account I think the one you saw earlier, P110. The 10 million out of the RM20million, RM10million goes into 8th July, into account 906. Can you see that?

J: Yes, I see the RM10million.

S: And you recall it was informed to Joanna:

J: MNR.

That is your good self, sir.

J: going to write cheques.

And exactly as stated, cheques are being written from 16th July to the 25th July. Can you see?

J: Yes, 16th July to ...

S: 25th, sir. I mean there are small cheques, big cheques, RM5 million, RM1 million, RM1.5 million, RM1 million. Okay. And from this sir, it is clear that Jho Low was making sure that you had enough money to write cheques, correct sir?

J: It would appear so. Yes.

[2012] The above shows unmistakably that Jho Low was informing Joanna Yu (PW54) on 8 July 2014 to expect RM27m from PBSB and asked that PW54 confirm that the funds had been remitted into Account 880. The reason is equally obvious. Jho Low checked with PW54 to ensure that the cheques 'MNR' was 'going to write' would be honoured. It was thus imperative that the funds from PBSB first arrive so that the cheques would not risk rejection. As it turned out, the RM27m did, as mentioned, earlier arrive on 8 July 2014, out of which RM10m was transferred into Account 906, from which between 16 July 2014 and 25 July 2014, the accused issued several cheques for various amounts.

[2013] I should add for context that much of the evidence in the BBM chats which I now set out to contradict the defence's contention that Jho Low was acting reactively in placing funds into the accused's account has already been earlier set out in my analysis at the end of the prosecution case on the presence of the accused's dishonest intention to misappropriate the RM42m from SRC which shows communication in the BBM chats between the accused and Jho Low vis a vis the management and operation of the accused's personal accounts.

[2014]Further evidence of Jho Low knowing in advance on the accused's intention to issue cheques is the conversation recorded in the BBM chats (P578) which the accused confirmed in his testimony, which concerned that on 21 August 2014, vis a vis the issuance of a cheque of RM5m to UMNO.

[2015]The notes of proceedings dated 9 January 2020 — DW1 recorded the following to such effect:

> S: This is again a conversation on the 21st of August 2014 at I think is morning, 41 minutes that means its 12 midnight but 41 minutes, the fourth item, sir. You got it sir?
>
> J: Hang on.
>
> ...
>
> S: ... If you read it, the message is what is important. This is a call from Jho Low to Joanna. He says sorry it's a BBM message: J: Need to issue another cheque for 5m to Umno. That's what...
>
> J: Yes.
>
> S: Yes. Then:
>
> J: ...okay to do it.
>
> He's asking Joanna whether there's sufficient funds. J: Please arrange enough funds. And Joanna responds:
>
> Joanna: Ok.
>
> J: Okay.
>
> S: So if you are now to look at bank statement, P110. On the 21st August, you can see a cheque for RM5 million exactly as stated in the chat on the 21st August?
>
> J: 21st August?
>
> S: Yes sir. You can see RM5 million debit? Can you see that?
>
> J: 21st August, yes, I see that.
>
> S: Yes. And you can see that this transaction is in fact also informed to Nik Faisal. From where I read if you just go on, where I read:
>
> J: Need to issue another cheque for 5m to Umno. Joanna: Will prep to move...
>
> That means interbank transfer:
>
> Joanna: ... for both 5m cheques to m
>
> Joanna: Both issued fr the MY account ya?
>
> J: Yes.
>
> And then if you just go down:
>
> J: Pls prepare wire instruction to move funds.

J: Email to Nik Faisal...

So you can see Nik Faisal is also kept in the loop sir? You see that? You can see that sir? Just below that and then I'll just show you how it is transferred by Nik. J: Need to issue another cheque for 5m to Umno. Joanna: Will prep to move enough for both 5m cheques to m.

Joanna: Both issued fr the MY account ya?

J: Yes. J: Pls prepare wire instruction to move funds. J: Email to Nik ... and Nik Faisal.

J: Both.

Can see that sir? The same one I read?

J: Below the line?

S: Yes sir.

J: Yes, I see that.

S: And the, what has been discussed between Joanna Yu and Jho Low that Nik Faisal should carry, put into effect the transfer is in fact done. I can refer you now to the document, P280. Same date, 21st August 2014. It's coming to you sir. Okay, you have that sir? So on the same day of this chats, same day you wrote the cheque, now there is this 21st August, Nik Faisal writes to the bank to debit sum of RM10 million from account 898 into 906. Can you see that sir?

J: Yes.

S: Yes. And just to put you completely at ease, and if you now look at P109 which is account 898, as per instructions, on 21st August, you see 21st August, sir? There's a debit transfer of RM10 million. You see that?

J: Yes.

S: Yes. And now you look at, I told you it's tedious because it's a money trail, that's how it works. Then now you look at P110. I should have shown it earlier, I'm sorry. That 10 million on 21st August, credit transfer 10 million is reflected on 21st August. Correct?

J: 21st sorry August yes?

S: Yes sir. You can see the RM10 million as per instructions of Nik?

J: RM10 million credit transfer.

S: And then you can see on the same day you write the RM5 million cheque, correct sir?

J: Yes.

S: So basically you can see Jho Low contacted Joanna to check of the balance and informed her to contact Nik to do the necessary transfers, so that you can write the cheque. Basically to ensure the cheque does not bounce. Basically to ensure there are sufficient funds in the account. Correct sir? You have to answer.

J: Yes.

[2016]Whilst there was a debit of RM5m from Account 906 on 21 August 2014, Jho Low contacted PW54 and told her 'Need to issue another cheque for RM5 million to UMNO'. The fund required was a total of RM10m in Account 906. He also asked PW54 to inform Nik Faisal to transfer funds so that the cheque dated 21 August 2014 and the cheque to be issued on 26 August 2014 would be honoured. The RM10m was then credited to Account 906, and the two cheques dated 21 August 2014 and 26 August 2014 got cleared in Account 906, as recorded in the statement of account for Account 906 (P110). Again, this is not an example of Jho Low being reactive.

[2017]On yet another of a conversation recorded in the BBM chats (P578) between Joanna Yu (PW54) and Jho Low, it is undeniable that Jho Low on 20 November 2014 checked on the balances with PW54 on the three personal accounts because the accused 'Needs to write a RM10 million cheque'. This shows that again Jho Low knew very well before 20 November 2014 that the RM10m cheque was to be written. Nevertheless Jho Low could not effect any transfer of funds which therefore resulted in an overdraft position for Account 898. Soon after Jho Low caused Nik Faisal to instruct the interbank transfer of RM3m and RM7m from Accounts 880 and 906 respectively to Account 898 to ensure that the cheque was honoured. This further reiterates that the efforts of Jho Low were not reactive.

[2018]This is crystal clearly shown in the notes of proceedings dated 9 January 2020 — DW1 which read as follows:

S: I will take you to the next chat, again Tab 9. Page 42 of 43. Okay, have you got 42 of 43, sir?

J: Yes, I have.

S: And if you look at item three from top. 20th November 2014. 19:43. You got that sir?

J: Yes.

S: And I'll read Jho Low is asking Joanna.

J: What r the balances in each of the 3 accouts for mnr?

J: He needs to write an rm10m cheque?

You saw that sir?

J: Yes.

S: And MNR is your initial sir? Correct sir?

J: Yes.

S: Now invite you to P109, account 898. If you look at 3rd December. Can you see? 4th December. Can you see the cheque for RM10 million, sir? **A**

J: 3rd December?

S: I think its 4th December. Yes, 3rd. Sorry. 3rd December. You see the RM10 million? He says you have written a cheque for RM10 million and here there is a cheque for RM10 million. Correct sir? **B**

J: Cheque presented, yes. RM10 million.

S: Yes. That means you have written a cheque sir. That's all I am saying.

J: Yes. **C**

S: And as a consequence of that, the account went into OD. You can see, RM9.8 million and thereafter, there were credit transfers in fact without going into the document, because it went into OD, there were credit transfers from your account 880 of RM3 million on the 4th and another credit transfer from your account 906 of RM7 million. Can you see that sir? **D**

J: On the same page?

S: Same page ...

[2019] There are other situations. These include on 23 December 2014, where as reflected in the BBM conversations (P578), the accused messaged Jho Low about the former's problems with his Platinum credit cards, which led to Jho Low contacting PW54 who assisted to clear the credit card transaction as the accused was then in Hawaii. The accused testified that a sum of USD130 thousand (RM466,330) was charged for the purchase at Chanel to his credit card. This is far from Jho Low being reactive. **E** **F**

[2020] Further, the two conversations on 26 March 2014 and 2 February 2015 which were confirmed by the accused showed that Jho Low was always checking the status of the accused's accounts. This is unsurprising since the accused already confirmed that Jho Low was also assigned by the accused to ensure sufficient funds in the accused's accounts. Again the notes of proceedings dated 9 January 2020 — DW1 states thus: **G**

S: The chat is from Joanna, Jho to Joanna. **H**

What are the amounts in the 3 accounts?

Getting Nik to sign.

1MY 2million, 1MY 1Malaysia Y1MY 8 million. After today. YM 20 million.

So this is after the 10 million. **I**

Yes, after clearing the cheque today and moving the 10 million from 1MY to Y1MY, cheque, cross cheque.

Okay. And then for information his message, for information:

Dear YB Dato' Sri, then the balances. Establish local CSR balances in AmBank. 1MY 2 million.

Basically the same is repeated.

Tracking it closely so another 10 million utilize. Thank you.

He said okay.

You agree that this shows that there is a continued effort, Jho Low in communication with the bank and in liaison with Nik to ensure there were sufficient funds all time for you to issue the cheques? Correct sir?

J: Yes.

[2021]And the accused on 18 May 2014 kept Jho Low informed after writing the cheques for RM10m for Jho Low to attend to, as shown in the notes of proceedings dated 9 January 2020 — DW1:

S: Next tab 6, same tab, you have to go to page 9 of 10 sir, the last line, easy this one. Can you see the last line sir? 18th May 2014. If it's empty there, we have established it's from Jho Low to Joanna.

Please check if AmBank account is overdrawn.

And over the page:

Boss said he wrote a big cheque. You see that sir?

J: Yes.

S: Now if you look at P110 which is account 906, look at 16th May 2014. You'll see the word there sir.

Boss say he wrote a big cheque.

That means you have already written a big cheque. This on 18th May. So if you look at 16th May, you had written a cheque for RM10million. Correct sir?

J: Yes.

[2022]In addition, as mentioned previously, on 11 August 2014, the accused contacted Jho Low regarding his problem in charging his credit card in Italy and to ensure sufficient funds to use the credit card, also as recorded in the notes of proceedings dated 9 January 2020 — DW1:

S: So the conversation, you agree sir, this relates to your visit to Italy and your purchase of jewellery as you said for Sheikh Ahmad, the Prime Minister of Qatar. You agree this is the transaction and this depicts what has happened?

J: Yes.

S: So from this conversation, it is also clear that Jho Low was making sure all transactions were honoured, correct sir?

J: Yes.

S: From this transactions and conversation Dato' Sri, Jho Low verified the accounts with bank for the purpose of ensuring there were sufficient funds for you to use the credit card and issue cheques? Correct sir?

J: Yes.

S: And I am putting it to you that these BBM chats would show that Jho Low was, on some occasions, in contact with you to ensure that the credit card and cheques were all honoured?

J: He was basically liaising with Azlin, basically with Azlin.

S: Yes but on some occasions sir?

J: Very few occasions, very few occasions.

S: Very few occasions he liaised with you. And I am putting it to you, from these BBM chats, on occasions, you were also kept informed of the balances in your account, so that you'll be able to can gauge how much you can spend?

J: Not directly but through Azlin. I was normally informed through Azlin.

[2023]This further confirms that Jho Low, together with Nik Faisal and Datuk Azlin were tasked to ensure sufficient funds in the personal accounts of the accused, and that Jho Low was in contact with the accused, and according to the accused, with Datuk Azlin as well, all with a view to ensuring all cheques written by the accused would not bounce.

[2024]This has been firmly established. All these were primarily adduced out from the BBM chats (P578 and D650), a document which the prosecution disclosed in court, as attested to by PW54, following an order I made acceding to an oral application made by the defence for its disclosure in the earlier part of the proceedings in the prosecution case.

[2025]The circumstances therefore show that Jho Low did what he was assigned to do, and importantly for present purposes, contrary to the argument of the defence, did not at all always act reactively in response to the issuance of cheques by the accused, thus discrediting the contention that there was no contact between Jho Low and the accused on the latter's accounts or his plans on writing cheques or that the accused did not know the balance in his accounts.

The motive for Jho Low's efforts to ensure sufficiency of funds

[2026]The defence then suggested a reason, as intimated earlier, as to why Jho Low was especially committed to and insistent on wanting to ensure the cheques issued by the accused do not get dishonoured for lack of funds. Thus

when referred to the BBM chats (P578), PW54 agreed that throughout 2014, the Accounts 880, 898 and 906 had gone into overdrawn positions numerous times as a result of cheques being drawn and presented without the accounts having sufficient balances to cover the same. Time and time again Jho Low impressed on PW54 to not let the cheques bounce. PW54 even prepared numerous draft letters which were sent to Jho Low and Nik Faisal for them to adopt to seek the bank's indulgences. There was even an instance where PW54 had used her own funds to make deposits into the accounts to avoid the accused's personal cheques from being dishonoured. Jho Low paid her back eventually.

[2027]The numerous instances of the accounts going into overdrawn positions as a result of cheques being issued and the numerous substantial cash deposits that followed were flagged up by the bank. By about October 2014, PW54 was instructed not to accept cash deposits anymore. Despite PW54 informing Jho Low of this, he appeared to ignore the same. This clearly shows that Jho Low was desperate to ensure that cheques issued from the accounts do not get rejected. Thus the defence argued that the evidence establishes that Jho Low's entire impetus for undertaking the transactions to have funds remitted into the personal accounts of the accused after the same got into over drawn positions was to ensure that the cheques issued would not be dishonoured.

[2028]It is an important assertion of the defence that the reason for this rigorous commitment exhibited by Jho Low to avoid the accused's cheques from being dishonoured is that Jho Low had led the accused to believe that the funds in the accounts in 2014 were from further Arab donations as indicated by Jho Low and reflected in the fourth letter in D604. The defence highlighted that the accused's belief was fortified by the fact that the cheques were never dishonoured. Thus, this exchange during cross-examination as recorded in the notes of proceedings 19 December 2019 — DW1:

> S: So your sense that there was Arab money cannot be correct. Now you know that?
>
> J: It was correct because most of the cheques were cleared, you see.

[2029]The defence argued that had the cheques been dishonoured, there would have been cause for the accused to raise queries into the accounts as it would have then triggered him to question what was being told to him by Jho Low. If such a query had been made, it would have become apparent that the actual balances in the accounts were not reflective of the alleged Arab donation monies. Investigations would have also led to Jho Low's utilisation of SRC funds in excess of RM200m, and his deception uncovered. This narrative is supported by the testimony of the accused during cross-examination, as recorded in the notes of proceedings dated 8 January 2020 — DW1, as follows:

S: You have throughout portrayed yourself in these transactions as being a victim of Jho Low's manipulation. Correct sir? **A**

J: Yes.

S: But you must be the first victim of any manipulation to actually gain millions in your account? **B**

J: I wouldn't know.

S: You wouldn't know. But in your case, you did. As a victim you did gain?

J: That was not my, I didn't ask for it. But you could put it that way, yes. **C**

S: That's the only way to put it sir. You agree there's no other way to put it. You're a victim and monies end up in your account and you spent it. Usually Dato' Sri, victim of any manipulations of accounts will lose money, am I correct? The former Finance Minister, man of finance, you will know that.

J: Yes, usually. **D**

S: Here it looks like the manipulator lost money?

J: I cannot come to that conclusion.

S: But he did put his money out into your account, so he definitely lost money on the facts of this case sir. Don't confuse yourself with all the other cases. I'm not dealing with all the rest. **E**

J: He could have made from other areas.

S: No, no, I'm asking these monies that were put in he lost by putting this money, in this case. This 80 or 90 million? **F**

J: He put in, yes. But I do not know what else he made in other areas.

[2030]The accused offered an explanation when re-examined, as follows:

S: Now we come to the last point. Now the prosecution said you claim to be a victim in this entire episode where the RM42 million, various charges were raised against you. But the prosecution asked you this question which is an important question to address. Why are you benefiting from this scam? You are a victim of a scam. Why are you benefiting even as low as RM42 million. Why are you benefiting? Why would somebody, the scammer, whoever is scamming it, why would he put RM42 million in your account if you are not part of it? Now that is a question I want to ask you directly. I want to give you the fullest latitude to answer this. **G** **H**

J: I believe from now that we know, I mean the facts that had emerged before and especially during the trial, that Jho Low benefited immensely even from the days of TIA, 1MDB and SRC. For example in the issuance of the Islamic Medium Term Notes. It was in the other court I believe. During the proceedings, it was mentioned and confirmed in the court, never challenged that he made more than 500 million from the issuance of 1MTN and in cahoots with the bankers. **I**

...

S: And the prosecution did not allege?

J: No, not at all. And also during the IO testimony, he mentioned about Jho Low benefiting from the 100, I don't know how much, was it RM170million?

S: 170?

J: Yes, 170 of PCC. They benefit from that and also from...

S: PPC?

J: PPC. Sorry, Putra Perdana and also from another dealing I think it was Global Mail Resources or whatever.

S: Mail Global Resources?

J: Yes.

S: You are talking about in this case? The investigating officer in this case?

J: In this case yes. So Jho Low made a lot of money. And I am not surprised that he is also involved in other scams as well. And I don't want to mention here because I don't have the evidence, you know whether he was involved in other instances. But having made immense amount of money elsewhere, I think he must have thought that if he didn't continue to ensure that the donations were to flow into my account, then it would affect his relationship with me and as more seriously, would lead me to try to uncover the scams that he was involved in. And he was worried about that. Perhaps, he needed to continue to ensure that I had confidence and faith in him. So the RM42million in that sense is miniscule, you know compared to what he was benefitting. So I think that's my take on this because he saw it as an investment if you like or as a bait or whatever it is, so that he can continue and benefit from the other activities that he was doing to benefit himself. So I think that would be my take on it.

...

S: Yes, you mentioned something which I need a little bit of explanation. You mentioned that he has to undertake putting in this money in order for you not to discover and at the same time you said as a bait. Can you expand on that what do you mean not to discover? For you not to discover.

J: Because if he did not keep up with the donations, then I could be suspicious of what he was doing. And you know, he was afraid that I could begin to question him. And that would mean that the, whatever he was doing could be discovered or at the very least I would not have that confidence in him anymore and he couldn't benefit from that relationship with me.

S: That you had explained clearly. You also used the word he was baiting you. What do you mean by he was baiting?

J: Well baiting in the sense that RM42million would be a small amount compared to what he was benefitting and he would likely to benefit in the future. You know you could see that that relationship could bring a lot of benefit to him in the future. So I think that was his mistake.

[2031]This is not an unattractive theory. However, it is also seriously flawed. This attempt at rationalising the commitment shown by Jho Low in his efforts of assiduously ensuring availability of funds in the accused's personal accounts which was more elaborately offered during re-examination is unconvincing. I say so for a number of reasons.

[2032]To put things in proper context, this contention of the defence is to further reinforce the accused's main defence of the absence of knowledge of the accused of the remittance of the SRC's RM42m into his personal accounts, this time focussing on why Jho Low could have wanted to conceal the various transactions he had arranged to fund the accounts of the accused to avoid any of the accused's cheques from being dishonoured.

[2033]As I have stated earlier, this claim of absence of knowledge fails to raise any reasonable doubts on the finding that the prosecution evidence that has established knowledge on the part of the accused in the first place. I have listed among others, the evidence of the accused's own affirmation in an affidavit, his own instructions for the transfers of RM32m in exh P277, the lack of any complaints to the bank by the accused during the material period for any alleged unauthorised transactions, the involvement of the mandate holder for his personal accounts and his principal private secretary in the transfers from SRC to his Account 880 and Account 906 through GMSB and IPSB, his immediate utilisation of the RM42m, the conversations between PW54 and Jho Low in the BBM chats (P578), the accused's own position of control over SRC, and the absence of any action on his part even after being personally informed by PW37 and PW49 of the source of the RM42m that went into his accounts.

[2034]In any event the testimony of the accused that Jho Low continually ensured the availability of funds and for that purpose even to the extent of covertly resorting to questionable transactions because he wanted to maintain the relationship with the accused and continue to benefit from it does not lend much credence. What it instead does is to further confirm the close relationship between the two, the role of Jho Low in the operations of the accused's personal accounts and the trust the accused had in him.

[2035]It also raises question on the true status of Jho Low in the management of the accused's personal accounts given the absence of any appointment by the accused, like what he had formalised with Nik Faisal who became his mandate holder. The accused did not seem to be concerned about this.

[2036]It affirms their long standing relationship. As testified by the former group MD of AmBank (PW50), it was Jho Low who introduced him to the

accused at the private residence of the Prime Minister in 2010 to facilitate the opening of Account 694 and the credit card accounts for the accused.

[2037]Above all however, the accused was the Prime Minister of the country. Jho Low fully understood his role to ensure availability of funds in the accounts of the accused. He delivered. There is a serious doubt in the scenario that Jho Low would indulge in deceitful activities which harmed the interests of the sitting Prime Minister when dealing with the personal bank accounts of the Prime Minister without the blessing of the Prime Minister, tacit or overt.

[2038]I do not think given the circumstances, he would have risked to do what he did to ensure sufficient funds in the accounts of the accused so that his secret dealings were not exposed and the good relationship with the Prime Minister, from which he benefited, not ruined. The more weighty consideration must have been not wanting to risk doing anything improper vis a vis the personal accounts of the Prime Minister to attract investigations against himself. It is plainly too far-fetched to imagine a scenario that a subordinate would have the audacity to orchestrate fraudulent transactions that would directly implicate the serving Prime Minister. Or to even suggest that the accused was as Prime Minister of the country fell victim to a scam master-minded by Jho Low, which resulted in huge sums of funds being credited into the personal accounts of the Prime Minister, which the Prime Minister spent on and benefitted from. Hardly a pathology of a financial scam.

[2039]And as it turned out, evidence has shown that Jho Low was instrumental, if nothing else, for the purposes of the charges in this trial, in the remittance of RM42m out of SRC into the personal accounts of the accused with the involvement of Nik Faisal. For the reasons I have just stated, I find that he would not have done this without the knowledge of the accused. Thus this argument of the defence that Jho Low's efforts to fund the accounts were to ensure that the accused did not find out about the actual transactions is in my judgment is unmeritorious. There was no absence of knowledge on the part of the accused on the remittance of the RM42m into his Account 880 and Account 906.

[2040]I should point out that this assertion that Jho Low had wanted to ensure there was no problem with clearance of the accused's personal cheques to avoid any query from the accused is on the premise that such query could expose the alleged deception of Jho Low on the receipt of further Arab donation monies in 2014 and his alleged secret profits. This thus presupposes a certain state of knowledge of the accused on the alleged Arab donation monies.

[2041]In other words, it is based on the premise that the accused's belief of the said Arab donation monies was different from the true position known to Jho

Low. The defence suggested that whilst the alleged Arab donation monies had been fully utilised in late 2014, Jho Low had led the accused to believe on the basis of the fourth Arab letter (D604) that remittances from Saudi Royalty would still be forthcoming. Therefore, if however both the accused and Jho Low had the same state of knowledge on the Arab donation monies vis a vis the four Arab letters in D601 to D604 (in that they did not believe there were still funds from the alleged Arab sources then), this argument of the defence must fall, and the entire case of the accused pertaining to the knowledge of the accused, demolished. This is what I shall consider next.

The defence of the accused on his honest belief of Arab donation monies

[2042]All roads lead to Rome. In this case though, they lead to Riyadh. Or so it seems. The many arguments of the accused relate to the crux of the defence of the accused which is that his belief and state of knowledge of his accounts and their operations is premised on the alleged Arab donation monies. I have earlier mentioned that the argument that the accused had no knowledge of the remittance of the RM42m is not only reliant on his alleged non-involvement in the management of his own accounts and the absence of knowledge about the balances, but is also crucially heavily predicated on his belief about the Arab donation monies. This then raises the question whether his alleged belief and knowledge that the foreign remittances came from King Abdullah is genuine or contrived.

[2043]As this is a very crucial aspect of the defence of the accused, I will address all the issues raised by the defence in its written submissions in the order they appear.

The defence of Arab donation monies — In summary

[2044]The defence submitted that the circumstances and events established by the evidence supports the inference of the accused holding a bona fide and reasonable belief that the funds in his accounts in 2014 and 2015, being the material period for the CBT and money laundering charges, were further Arab donations intimated by Jho Low to have been remitted, and reflected in the fourth donation letter of D604 based on the following:

(a) the circumstances and events from January 2010 up to 2015 relating to the pledge of support, the manner in which the remittances were made, the intimations from Jho Low and the production of supporting letters;

(b) events which fortified the perception of Jho Low's authority from the Arab royalty and role as a conduit to facilitate the donations from 2011–2014;

(c) the continuous reporting of the remittances and the supporting letters from 2011 to 2014 to AmBank, BNM and the Central Bank Governor personally and the transparency of the transactions further fortified the belief on the genuineness of the donations;

(d) the circumstances in 2014 and 2015 were as had prevailed since 2011 and there was no occurrence which could have reasonably raised any cause to suspect that the 2014 transactions were different from the previous 2011–2013 donations. There was no cause to query the source of the funds as the circumstances as a whole led to the belief that the funds in the account in 2014 were a further instalment of similar donations made previously in 2011, 2012 and 2013;

(e) the belief was caused to be maintained by inter alia ad hoc confirmations by Datuk Azlin prior to issuances of big cheques and all cheques issued from 2014–2015 being honoured;

(f) other events which transpired including verification of the D601–D604 letters from Prince Saud and confirmation of entities such as Tanore Finance Corp. and Blackstone Asia Realty Partners being nominees of the Arab royalty; and

(g) the conduct of the accused throughout the period was consistent with the belief that funds in the accounts from 2011–2015 were all from Arab donations, in view of the following:

(i) his requests to adhere to all rules and regulations when the earlier Account 694 was opened;

(ii) his understanding of complete reporting;

(iii) the utilisation of some 99% of RM1 billion from the 2011–2013 donations were for CSR initiatives and the 13thGeneral Elections;

(iv) the return of the unutilised donations of USD620m in 2013;

(v) the impetus for opening the Accounts 880, 898 and 906; and

(vi) the continued utilisation of funds primarily for CSR initiatives throughout 2014–2015.

[2045]The defence thus submitted that in view of the above, the accused's belief that the funds in his accounts in 2014 and 2015 were from donations made at the behest of the Arab royalty is a reasonable inference which can be drawn from the evidence as a whole.

[2046]I will now examine each of these arguments vis a vis the evidence in this case.

The background to the meeting with King Abdullah in Riyadh in January 2010

[2047]The starting reference must be the meeting in 2010 between the accused, as the country's Prime Minister with the late King Abdullah bin Abdulaziz Al-Saud ('King Abdullah'), the then King and Ruler of the Kingdom of Saudi Arabia ('KSA') in Riyadh. This was related by the accused in his testimony, which the defence fairly accurately summarised as follows.

[2048]The accused said that in 2009–2010 Jho Low had shown influence with the members of the Saudi royalty as he had facilitated meetings with Prince Turki bin Abdullah bin Al-Saud ('Prince Turki'), a son of King Abdullah. Sometime before January 2010, Jho Low intimated to the accused that King Abdullah wished to award the accused with the highest civilian award of KSA. This is known as the King Abdulaziz Order of Merit (1st Class) which had at that time been awarded to dignitaries such as the former American President, Barrack Obama and the Russian President, Vladimir Putin. Jho Low indicated that he would arrange for an audience with King Abdullah through the 'back channels' (outside the involvement of the Ministry of Foreign Affairs), apparently a recognised practice in government to government relations.

[2049]This resulted in a visit by the accused to the KSA in January 2010. As indicated by Jho Low earlier, King Abdullah did award the King Abdulaziz Order of Merit (1st Class) to the accused. During this visit in January 2010, through the 'back channel' efforts of Jho Low, an audience with King Abdullah was arranged with the accused and the other members of the Malaysian delegation, which included the Minister of Foreign Affairs, the Minister in the Prime Minister's Department (Islamic Affairs), and the Ambassador to KSA.

[2050]Then, King Abdullah had addressed the Malaysian delegation and at the end of that meeting, King Abdullah and the accused moved to another part of meeting hall for a private conversation, with the King's translator and the Minister in the Prime Minister's Department (Islamic Affairs) standing closely behind the two leaders.

[2051]The accused's recollections of the same was included in his witness statement(PSSB1), specifically in answer to question 166, as follows:

> Pada pertemuan peribadi yang lain, King Abdullah sangat mengagumi Malaysia dan kemampuan kerajaannya untuk mengekalkan keamanan di dalam masyarakat yang pelbagai budaya. Kami juga berbincang tentang keperluan Malaysia dan Arab Saudi untuk mengukuhkan lagi kerjasama dalam membasmi segala bentuk keganasan. King Abdullah juga memberi perhatian khusus dengan trend militan yang semakin meningkat dan ajaran Islam yang menyimpang yang mana sedang

memasuki ke dalam dunia Islam danmeminta saya supaya memastikan Malaysia terus bebas daripada pengaruh negatif tersebut. Berkenaan dengan hal ini, Raja Abdullah secara peribadi memberi jaminan kepada saya bahawa baginda akan *memberikan saya sokongan* supaya saya boleh terus memimpin negara sebagai contoh yang bagus sepertimana Islam sepatutnya diamalkan. Saya sangat bersyukur dan menzahirkan penghargaan saya kepada King Abdullah. (Emphasis added.)

[2052]Thereafter in the middle of 2010 — and this is absolutely crucial — Jho Low informed the accused that King Abdullah wished to make financial donations to the accused, and the same were going to be remitted soon. As an important mainstay of his defence, the accused attributed this wish to King Abdullah's own assurances of support to him at that private audience in Riyadh in January 2010.

[2053]It is clear from the testimony of the accused, as highlighted above, that at the meeting with the Saudi monarch, the latter did mention his support for the accused's administration of Malaysia which in the late King Abdullah's view was a model of Islamic governance of a peaceful multi-cultural nation which should continue to be maintained.

[2054]Importantly however, it should be immediately realised that King Abdullah did not articulate the form of the support. In other words, based on the testimony of the accused — in his witness statements and answers when cross-examined and re-examined — during the 15 days on the witness stand as DW1, King Abdullah did not mention the intention to provide any *financial* support or *donation of monies* to the accused. Or to Malaysia. And it is after all common to read about a leader of an independent country to express support for the leadership of another in international relations and alliance diplomacy.

[2055]It was only (based on the answer to question 168 of the witness statement of the accused) in the middle the same year of 2010 that according to the accused that he first got to know of King Abdullah allegedly wanting to donate funds to him, based on what was told to the accused by Jho Low. According to the accused, in his mind, the donation would be consistent with what King Abdullah had told him at the January meeting in Riyadh.

Whether the accused took steps to verify the claim by Jho Low on financial donation from King Abdullah

[2056]There are many questions with this testimony. First the accused did not say that he directly heard from or was personally informed by the Saudi monarch about the cash donation. Secondly, there was no evidence of the accused attempting to verify this intention attributed to King Abdullah with anyone. Not with the King directly, nor with any of the government officials

who could have easily checked to verify the information for the Prime Minister. There was, thirdly, no evidence if the intended donation would be accompanied by any conditions of use, either. None whatsoever. The accused merely took the word of Jho Low.

[2057] The defence tried to justify the accused's trust in Jho Low. It argued that the principal matters that led to the accused perceiving Jho Low as a person closely associated with and influential with the Saudi Royalty were made up of the following matters, as testified by the accused:

(a) Jho Low's intimation that the accused would be awarded the King Abdulaziz Order of Merit (1st Class) by King Abdullah materialised in January 2010;

(b) the audience with King Abdullah in January 2010 was arranged by Jho Low through the 'back channels';

(c) Jho Low had intimated that the accused's request for increased Haj quota for Malaysia had been agreed to by King Abdullah prior to official communication on the same being received;

(d) during the Arab Spring crisis, Jho Low arranged for two planes to ferry Malaysian students from Egypt to Jeddah and for the students to transit through Jeddah without visas to the Tabung Haji Complex;

(e) the accused was gifted with a *Qiswah fabric* from King Abdullah; and

(f) Jho Low's dealings with Prince Turki, who was at the time highly placed in the Arab royalty, reflected that he was indeed chosen to act for the Arab royalty.

[2058] I accept that some of these matters are corroborated by the testimony of the Malaysian Ambassador to KSA (DW4). I also agree that the principle that a suggestion made in cross-examination is indicative of the case the party wishes to rely on would apply to the questions put by the prosecution to the accused on Jho Low being the liaison with the Saudi Royal family which facilitated meetings, and for the purposes of arranging the donation monies being paid into Account 694.

[2059] The Court of Appeal in *Samsuri bin Tumin lwn Pendakwa Raya* [2011] 6 MLJ 358, cited the following passage from judgment of Augustine Paul J (as he then was) in *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1:

> A suggestion in cross-examination can only be indicative of the case put forward or the stand taken by the party on whose behalf the cross-examination is being conducted.

[2060]Accordingly, such suggestions as put by the prosecution to the accused would amount to concessions corroborating the accused's perception ofthe authority and role of Jho Low in that context. Nevertheless, the prosecution does challenge the accused's reliance on Jho Low's intimation of impending donations from King Abdullah which preceded the remittances.

Whether reliance on and trust in Jho Low's claim is justified

[2061]In my view, even at this juncture — when the accused was in the middle of 2010 informed by Jho Low that donations from King Abdullah was imminent, the accused should, given the facts and circumstances then prevailing, have taken steps to verify the truth of the information. As I have stated, the accused himself never heard from King Abdullah about financial donation, either at the Riyadh meeting in January 2010 or on any other occasions.

[2062]There were also no details given about the donations, particularly if they would come with conditions. This was a donation from one sovereign and independent country to another. Would this be a form of foreign aid in terms of a grant if not a loan? Or was it intended to be donated on a personal basis, which would give rise to a host of other questions, including on national security? The accused could have easily picked up his mobile and instructed any of those top government officials who accompanied him at the audience with the late Saudi monarch in Riyadh in January 2010, especially the Foreign Affairs Minister (DW6) and the Ambassador (DW4) to verify with the KSA Government or the office of the Saudi monarch directly. Instead the accused, as the Prime Minister, was content with that simple notification from Jho Low.

[2063]As such, even though the accused claims that Jho Low represented the Arab royalty, and regardless of his influence within segments of the Arab royalty, and the accused's own confidence in him based on what he had accomplished, I find that the failure of the accused to ensure official confirmation of the intended donations from King Abdullah shows that his belief that the donations would be gifted by King Abdullah to have been most improbable. In other words, the accused held no such belief.

[2064]Further, even though Jho Low might have been able to make things happened vis a vis the Government of KSA, as well as its Royalty (as listed above), which the accused claimed to have impressed the accused, those are matters which appeared more to be in the form of the relationship between countries (such as arranging the meeting between the leaders) and assistance by one country to another (such as the increase in Hajj quota for Malaysian pilgrims and the evacuation of Malaysia students out of Egypt during Arab Spring) and of a recognition bestowed on a leader of another country (the

award of Order of Merit and the gift of the *Qiswah* fabric), which would ordinarily then be confirmed by official channels. For instance, the former ambassador (PW4) testified that he was informed of King Abdullah's decision to bestow the Order of Merit to the accused.

[2065]In sharp contrast, this claim that King Abdullah wished to make personal donation to the accused, the leader of another sovereign nation, to be paid into the latter's personal bank account appears unusual in international relations, even at the personal level between leaders of different countries. And there has been a total absence of any official governmental confirmation (both KSA and Malaysia) to support this defence of the accused, that the accused, as the Prime Minister had in actual fact been receiving in his personal bank accounts, personal donation from King Abdullah during the relevant period.

[2066]The case-law authorities referred to by the defence which refer to the manner in which a trial court ought to infer the existence or non-existence of a person's belief or knowledge in my view supports this conclusion.

[2067]In *RCA Corporation v Custom Cleared Sales Pty Ltd* (1978) 19 ALR 123; [1978] FSR 576 the Court of Appeal of New South Wales in discussing the element of knowledge to be established in copyright infringement, made the following observations:

> Except where a party's own statements or gestures are relied upon, proof of knowledge is always a matter of inference, and the material from which the inference of the existence of actual knowledge can be inferred varies infinitely from case to case.
>
> ...
>
> It seems to us that *the principle is more accurately put by saying that a court is entitled to infer knowledge on the part of a particular person on the assumption that such a person has the ordinary understanding expected of persons in his line of business*, unless by his or other evidence it is convinced otherwise. In other words, the true position is that the court is not concerned with the knowledge of a reasonable man *but is concerned with reasonable inferences to be drawn from a concrete situation as disclosed in the evidence as it affects the particular person whose knowledge is in issue*. In inferring knowledge, a court is entitled to approach the matter in two stages; where opportunities for knowledge on the part of the particular person are proved and there is nothing to indicate that there are obstacles to the particular person acquiring the relevant knowledge, there is some evidence from which the court can conclude that such person has knowledge. (Emphasis added.)

[2068]This case highlights that the inference of knowledge is on the assumption that such a person has the ordinary understanding expected of persons in his line of business. In the case before me, the accused was the Prime Minister of the country. That was, so to speak, his line of business. The lack of

any efforts on the part of the accused to seek official confirmation of the impending donation is certainly unexpected of a Prime Minister under such circumstances.

[2069]This is exactly the only reasonable inference to be drawn from this particular concrete situation as disclosed in the evidence which affected the accused whose knowledge is presently in issue. And there is absolutely nothing in evidence to indicate that there were impediments to the accused acquiring the relevant knowledge.

[2070]In the case of *Public Prosecutor v Badrulsham bin Baharom* [1988] 2 MLJ 585, the High Court held in instructive terms as follows:

> Knowledge being an element of the state of mind of a person, the obvious question is: how is one to prove the element of knowledge in order to establish possession. However that may be, certain modes of proof are acceptable as sufficient to distinguish between a genuine and a feigned defence. Those modes of proof are acceptable because unless a defendant confesses that he has the necessary knowledge which is an element of his state of mind such element must be judged from *his outward acts or omissions*. (Emphasis added.)

[2071]In the instant case, I reiterate that given the testimony that the information of the alleged donations from King Abdullah *sans* any details was notified not by any official channels but Jho Low, and considering the very nature of financial assistance from a foreign country, evidence of the accused's non-action to verify the information on the imminent donations shows that the accused did not have the knowledge that he would be receiving donation monies from King Abdullah.

Evidence of DW4, DW5 and DW6 of the meeting with King Abdullah in January 2010

[2072]The defence then submitted that the accused's testimony on his recollection of what King Abdullah had said was affirmed by the Malaysian Ambassador to KSA, Datuk Syed Omar Al-Saggaf (DW4), the Minister in the Prime Minister's Department (Islamic Affairs) General Major (R) Dato' Seri Jamil Khir Hj Baharom (DW5) and the Minister of Foreign Affairs, Datuk Seri Anifah Hj Aman (DW6) at the material time, whom the defence considered as disinterested witnesses who have nothing to gain in the matter. DW5 and DW6 however, I note, are active politicians.

[2073]I would agree with the contention of the defence that these witnesses generally support the version of the accused in relation to what had beenspoken by King Abdullah on the matters recollected, as follows:

(a) King Abdullah raised his concern with regards to unsavoury influences arising in the Islamic world;

(b) King Abdullah was complimentary of the accused's leadership by which Malaysia was able to be free of such influences and expressed his desire for Malaysia to continue being free of such influences; and

(c) King Abdullah gave an assurance of support with the aim of ensuring the accused's continued leadership in the government so as to avoid such untoward influences creeping into Malaysia.

[2074]These are largely uncontroversial and I accept are the essence of what the Saudi monarch articulated at the meeting. However more pertinent for the defence of the accused, the case of the defence is that there were other matters raised by King Abdullah which the prosecution argued are subject to some discrepancies.

[2075]Thedefence however argued that the discrepancies between the recollections of DW4, DW5 and DW6 are not material because the issue revolves around the accused's belief arising from the meeting with King Abdullah. His recollection was, so the defence asserted, corroborated by the three who accompanied him.

Inconsistencies in evidence — Whether King Abdullah mentioned personal donation at meeting?

[2076]The defence submitted that the relevant fact established is that King Abdullah did indicate his assurance to provide assistance to the accused to facilitate the accused's continued political leadership in Government of Malaysia.

[2077]This is correct. But this is also a key source of a material discrepancy which further dents the credibility of the defence of reliance on Arab donation monies by the accused. This is because despite this being the crux of his defence, the long testimony of the accused, the very person who had been granted audience to meet with the late Saudi monarch did not, as I have emphasised, include any assertion that King Abdullah had told the accused or the meeting in Riyadh in January 2010 that the monarch would in support of the leadership of the accused, provide *financial gift* to the accused.

[2078]General Major (R) Dato' Seri Jamil Khir Hj Baharom (DW5), a former Cabinet minister in charge of Islamic affairs between 2009 and 2018 during the administration led by the accused, testified that he accompanied the accused and attended the unofficial meeting on 11 January 2010 with King Abdullah Abdul Aziz Al-Saud in Riyadh. His testimony on the issues raised at

the meeting and the discussion after the conclusion of that meeting echoed that of Datuk Syed Omar Al-Saggaf (DW4), the Malaysian ambassador to KSA then (DW4). DW5 stated that the key issues at the meetings were the haj quota, the Arab Spring uprisings, and financial assistance from Saudi Arabia.

[2079]King Abdullah, according to DW5 (and DW4), was impressed with the administration of Malaysia with a multicultural population as a moderate Islamic country. King Abdullah also wanted to extend financial assistance as he wanted Malaysia to ward off Shia influence and to eliminate religious extremism. The Saudi monarch, according to DW5 wished that the accused continue to lead the country and wanted to provide financial assistance for the upcoming general elections in 2013 so that the government would remain in power.

[2080]DW5 maintained that he listened to the discussion after the meeting which involved only the two leaders, the interpreter for the King and DW5 himself. In particular he could understand Arabic as spoken by the King, and its English translation as articulated by the interpreter. And it was in that discussion that DW5 said King Abdullah had told the accused that he would be sending funds shortly after the said meeting on 11 January 2010 and that the money would be deposited into the accused's personal account, because the King was concerned that channelling the funds into other organisations or entities could complicate the manner in which the funds would be spent.

[2081]However, this testimony is in my assessment not easily reconcilable with the evidence given by the accused himself. First, DW5 did not know that according to the accused, it was Jho Low's efforts that helped secured the meeting. DW5 himself said he did not know Jho Low. The accused had testified earlier that Jho Low had informed him in the middle of 2010 that King Abdullah had agreed to provide him with support in the form of a financial donation. The accused did not mention that it was King Abdullah himself who mentioned the donation to the accused at the January 2010 meeting in Riyadh. The accused even said that he believed that Jho Low was managing the funds on behalf of the Saudi royal family. Jho Low was the conduit, and the accused believed Jho Low even represented the royal family.

[2082]Secondly, DW5 himself did not know how much King Abdullah, either directly or through an intermediary entity had transferred to the accused, or even whether there was in fact any donation from the King to the accused. Neither did he know that the accused had also returned some USD620m to the entity (which had purportedly transferred the funds to the accused's private bank account) just a few months after the 2013 general election, but only to subsequently receive another donation sum allegedly from King Abdullah in 2014.

[2083]Thirdly, despite maintaining that it was the accused who had made the request for donation from the King at the meeting (which flatly contradicts the evidence of the accused), the accused did not agree that receiving and requesting for donation from a foreign country for election purposes amounted to interference in the democratic process in this country by a foreign country. DW5 also agreed that although this donation is an important matter, he could not recall whether the subject was ever raised in any Cabinet meetings. He later in re-examination said matters concerning political funding would not be raised in the meetings of the Cabinet. DW5 however agreed that the public was not informed about this donation.

[2084]Despite this claim by these three witnesses that King Abdullah made that assurance of financial support, it was established in cross-examination that only DW5 who said he heard directly from King Abdullah. The accused in his testimony (which under the law has to be given before the other defence witnesses testified) says the issue of financial support was only raised later towards the end of 2010, by Jho Low. The witnesses, especially DW5 say that King Abdullah told the accused about the financial donation at that meeting in Riyadh in January 2010. This discrepancy is astounding.

[2085]The prosecution contended that the details in the testimonies of the three witnesses could not have been inadvertently left out from the witness statement of the accused. The fact that it was indeed left out, according to the prosecution raises the inference that this purported meeting where the offer of financial support or financial contribution was allegedly made could not have taken place but was an afterthought to bolster the defence of the accused. There is no explanation for this glaring omission from the accused's evidence of this alleged promise of financial donation.

[2086]It bears emphasis that it is the testimony of DW5, the former Minister in the Prime Minister's Department (Islamic Affairs) that it was at the said private or unofficial meeting on 11 January 2010 that King Abdullah had promised to provide financial support. Not only that, DW5 in his witness statement also said that the late King would provide the funds not long from the meeting date and that the funds would be channelled into a private bank account of the accused. DW5 even offered the reason for the remittance into a private account, which as I have mentioned, was so as not to complicate the disbursement process of the monies out of the account.

[2087]I must reiterate that in the testimony of the accused, he did not mention any of the information given in court by DW5 about the date of the meeting, the assurance of financial support, the approximate timing as to when it would be provided or the requirement for it to be transferred into a private account of the accused, let alone the reason for the same. Not at all.

[2088]To a certain extent, the testimony of the former Foreign Affairs Minister (DW6) supports that of DW5, at least in respect of the financial support and the requirement for a private account to receive the donation monies. In his witness statement, DW6 says:

> ... As we were exiting, the Prime Minister had sought for clarification from Major General Dato' Seri Jamil Khir regarding the confidential dialogue between him and King Abdullah as to whether he was correct in understanding that King Abdullah preferred the financial donation the King was making be transferred to YAB Dato' Seri Mohd Najib Razak's personal bank account. ... It was understood that King Abdullah did not want this contribution of money to be vaguely disbursed and may pose problems in their disbursement. Putting the money in personal account of the Prime Minister would bring about easier controls.

[2089]The evidence of the three witnesses is that at that audience with the Saudi monarch, at the end of the formal session, King Abdullah moved to another part of the meeting hall and had a private discussion with the accused. DW5 who,as mentioned, speaks Arabic testified that he closely followed behind the accused in this private discussion.

[2090]Thus both DW6 and DW4 could not verify what DW5 claimed to have happened, as they both were not privy to the private discussion and was only later informed by the accused of the details on their way out of the meeting hall. This is recorded in the notes of proceedings on 10 February 2020 — DW4:

> S: Then you say you saw Dato Sri Najib and Dato Sri Jamil Khir moved away form the meeting place with the King Abdullah, you personally did not hear what they spoke to each other?
>
> J: No.
>
> S: And what you stated in your witness statement, what you have stated in your witness statement is you have no personal knowledge of the facts, you have no personal knowledge of the fact stated it is for election etc?
>
> J: No.
>
> S: It is later you learnt about what was spoken?
>
> J: Yes, he told me.
>
> S: From whom?
>
> J: From Yang Amat Berhormat Dato Sri Najib.
>
> S: Later?
>
> J: Later.
>
> S: Later. How much later sir?
>
> J: Just when we are going out

S: He told you that?

J: Yes.

S: And the so whether this was true or not, you won't know?

J: I don't know.

[2091]The other issue with the evidence of DW4 and DW6 is that despite what they said was told to them by the accused as they were leaving the meeting, the accused himself made no mention of that communication with either of them in his testimony.

Inconsistencies in evidence — Whether the date of meeting with King Abdullah established

[2092]Another discrepancy in the evidence given by these three witnesses is on the date of the meeting. The accused, despite being a former Prime Minister could not specify the date of that January meeting in Riyadh. DW4 and DW5 testified that it took place during an informal meeting on 11 January 2010, prior to the formal meeting from the 13–16 January 2010. On the other hand, DW6 testified that it took place on a particular day which he was unable to recall, but he was certain that it took place during the official meeting between 13 and 16 January 2010. DW6 even denied that any informal meeting took place before the official meeting.

[2093]However during cross-examination, DW4 appeared to be uncertain as to the actual date of this unofficial meeting but was somehow sure it was either on the 10 or 11 January 2010. In the notes of proceedings on 10 February 2020 — DW4:

S: Informal meeting took place on that 10th January 2010 you said? That's what you have said sir.

J: 10 or 11.

S: 10th or 11th okay fine.

J: Yes.

[2094]DW6, the former Minister of Foreign Affairs on the other hand, when cross-examined unequivocally maintained that he did not know when such a private meeting took place, but stressed that, to his knowledge, there was no meeting, private or otherwise, prior to the official meeting scheduled visit on 13–16 January 2010. Thus in the notes of proceedings on 13 February 2020 — DW6:

S: Dato' Seri, according to the evidence of Dato' Sri Najib, during the private meeting, i.e. before the 13th January. Before the 13th of January 2010, King

Abdullah only assured Dato' Sri that he will provide support to Dato' Sri Najib to lead the country as a moderate Muslim country but there was no mention of any financial aid. That was the testimony of Dato' Sri Najib.

J: My Lord, I am not exactly sure when the meeting was held, because the official visit was between 13th and 16th, but there is no request for financial aid.

S: No, I didn't. You see the thing is I didn't say about request for financial aid. All I am saying sir, when Dato' Sri Najib, see I am not giving evidence, I am just telling you and asking you, your evidence differs. So now I am asking you as I am obliged to.

J: Fully understood.

S: According to the evidence of Dato' Sri Najib, during the private audience before the 13th January 2010, that's the first official meeting according to you which is deemed unofficial, and then you say it is all official.

J: My Lord, official meeting as so far as Wisma Putra is concerned is from the 13th to the 16th, and when exactly the official meeting must be between the 13th or 16th.

S: Sir, you are now going to confuse all of us. I will now tell you what we understand, the statement that was given to us earlier, the meeting before the 13th was designated as unofficial. You chose to designate it as official. So, there is an official meeting before the 13th and there is an official meeting on the 13th to 16th. You follow that sir?

J: Yes, but My Lord, I have to explain that as far as I am concern, the official visit from 13th to 16th. So when exactly the official meeting was called, I can't recall. You have to get Wisma Putra on it.

[2095]DW5's evidence that there was an unofficial meeting on 11January 2010 where King Abdullah allegedly promised financial support to the accused is patently inconsistent with the accused's own testimony where he stated in his witness statement (question 168) that he was informed by Jho Low around the middle of 2010 that King Abdullah had agreed to provide personal donations to the accused.

[2096]The accused could relate to other details of the meeting in his long and extensive testimony; such as who had accompanied him, the conferment of the special award, the receipt of the *Qiswah* fabric and the late King Abdullah's agreement to increase Malaysia's Hajj quota. But somehow not a word on the promise of donation allegedly made by the King at the meeting, which ironically is the core of his defence of belief of Arab donation monies.

[2097]Given the contradiction between the evidence of the accused and DW5 on this crucial matter that goes to the essence of the defence of knowledge of the accused, and with DW4 and DW6 not being privy to the private discussion between the late Saudi monarch and the accused, in my judgment the

purported promise of financial donation does not withstand scrutiny and could not have been made by the late King Abdullah on 11 January 2010 or anytime at the meeting in Riyadh in January 2010.

Inconsistencies in evidence — Whether King Abdullah asked for a private account be used to receive donation

[2098]Worse, there is also contradiction in the evidence of the accused and that of DW5 on the requirement to open a private account to receive the alleged donation. DW5 was specific in relating to this requirement which he claimed was uttered by the Saudi monarch. The believability of this assertion, that the Ruler of KSA would even make a suggestion for the accused to arrange for the opening of a personal account to ease disbursement process is already a matter for debate.

[2099]And this was not mentioned in the accused's testimony at all. Again, the issue of the personal account of the accused is absolutely integral to the case of the defence since Account 694 of the accused was opened with the assistance of the MD of AmBank Group (PW50) to receive the remittances from the alleged donation.

[2100]Crucially, not only is there no reference in his testimony to the suggestion by King Abdullah for a private account be opened, but also that instead the testimony of the accused provides a different variant to this narrative altogether. Which is that the decision to use his personal account to receive the said financial support was entirely his, after consulting Jho Low and the late Datuk Azlin, and not a suggestion by King Abdullah.

[2101]This is yet another critical detail that could not have been inadvertently left out of the evidence of the accused. It is a vital piece of evidence for the defence. The only explanation for the omission of this key evidence like that of other evidence as mentioned earlier is either the said private meeting did not take place or that the suggestion purportedly made by King Abdullah on the private account is a fabrication. Either way, this contradiction casts further doubt as to the credibility of the evidence of the accused in relation to what had transpired at the said private meeting with the late King Abdullah in Riyadh.

Inconsistencies in evidence — Whether King Abdullah said the donation would be given soon after the meeting

[2102]Yet another piece of evidence which is the subject of a conflicting version between the testimony of the accused and that of DW5, is the issue of the timing of the making of the alleged donation by King Abdullah. DW5 testified that the late King Abdullah promised during the private meeting that

A the financial support in the form of a donation would be sent to the accused's personal account within a short period from the date of the purported unofficial meeting on 11 January 2010.

B **[2103]**Incredibly this is a departure from the testimony of the accused who says that towards the end of 2010, he had received confirmation from Jho Low that the donations would be deposited soon. At question 172 of his witness statement (PSSB1),he said:

> C Menjelang penghujung 2010, JL memaklumkan kepada saya bahawa derma akan dimasukkan dalam waktu terdekat ...

[2104]In any event, the money purportedly from the late King Abdullah was only first deposited into the personal account of the accused — Account 694 — in February 2011. I cannot but conclude that this further contradiction D between the evidence of DW5 that the funds would be deposited not long after the 11January 2010 meeting and the evidence of the accused that the funds would be paid shortly after the end of 2010 completely erodes whatever credibility left of both the evidence of the accused and DW5 concerning the said meeting in Riyadh in January 2010.

E

[2105]Theprosecution submitted that these contradictions in the evidence of the accused and DW5 are not mere discrepancies caused by lapses in memory. These contradictions are material as they go to the heart of the accused's F defence that the funds that were credited into his personal account were based on a promise by the late King Abdullah. These contradictions involve important and material details that affect the credibility of the defence that the late King Abdullah had indeed promised financial support which was deposited as personal donations into the personal accounts of the accused.

G

[2106]Not that the defence did not admit the inconsistencies. But the defence does not provide any explanation to this glaring contradictions, but instead merely contending that these were inconsistencies between the recollection of each of the above three witnesses vis a vis the date of the private audience and H the exact details of matters being raised by King Abdullah at the meeting and private discussion thereafter.

[2107]The defence went a step further and submitted that the inconsistencies in the recollection of the witnesses actually lean in favour of credibility as it I proves that the evidence is not contrived. It refers to the judgment of Raja Azlan Shah J (as HRH then was) in *Public Prosecutor v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15 who had occasion to state the following:

> In this case different witnesses have testified to different parts of what had happened or what had been said and also there are, in the evidence of the witnesses for the

prosecution, some discrepancies, as would be expected of witnesses giving their recollections of a series of events that took place in 1971–1973. In my opinion discrepancies there will always be, because in the circumstances in which the events happened, every witness does not remember the same thing and he does not remember accurately every single thing that happened. It may be open to criticism, or it might be better if they took down a notebook and wrote down every single thing that happened and every single thing that was said. But they did not know that they are going to be witnesses at this trial. I shall be almost inclined to think that if there are no discrepancies, it might be suggested that they have concocted their accounts of what had happened or what had been said because their versions are too consistent. The question is whether the existence of certain discrepancies is sufficient to destroy their credibility. There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all. A court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the other. It is, therefore, necessary to scrutinise each evidence very carefully as this involves the question of weight to be given to certain evidence in particular circumstances.

Material inconsistencies affect credibility of evidence

[2108]In my view, while this is a rule of general application, the facts of the contradictions in the case before me are too significant to be deemed as symptomatic of human imperfection in recollecting the accuracy of past events because they directly relate to the essence of a key defence of the accused.

[2109]At the same time I am not unmindful of the decision of the Court of Appeal in the case of *Goh Ming Han v Public Prosecutor* [2015] 3 MLJ 781; [2015] 3 CLJ 17 which held, on the issue of conflicting evidence of prosecution witnesses that the court is not at liberty to accept all versions of evidence adduced by witnesses which are irreconcilable and in total conflict with one another. Abdul Rahman Sebli JCA (as he then was) ruled thus:

[11] Despite this glaring contradiction in the testimonies of SP2 and SP3 on the one hand and SP8 on the other, the learned Judicial Commissioner found all three of them to be truthful witnesses when he said 'Saya mempercayai SP2 dan SP3' and later, 'Saya juga mendapati tidak ada alasan untuk saya untuk tidak mempercayai keterangan SP8 ...' (p 24 of the judgment).

[12] With due respect to the learned Judicial Commissioner, he was not at liberty to accept both versions to be credible when the two versions were irreconcilable and in total conflict with one another. Either he believed SP2 and SP3 or he believed SP8 or he disbelieved all three of them. The learned judicial commissioner went into further error when he said that the evidence of SP2 and SP3 corroborated the evidence of SP8.

[13] The contradiction gives rise to the question; what did the prosecution prove at the close of its case in relation to custody or control of the container that contained the drugs? Was the container lying on the floor and picked up by the police or was

A it picked up by the appellant and handed to SP8? This fact was never established one way or the other as the learned judicial commissioner did not make a finding either way.

[14] The contradiction is serious and cuts deep into the prosecution case as it involves the crucial question of whether the drugs were in the appellant's custody or control at the time of the raid. ...

[2110]In the instant case before me, the discrepancies are material because the crux of the defence of belief of the accused on the promise of financial donation by the late King Abdullah was triggered by the information given to the accused by Jho Low, and not made by King Abdullah himself at the meeting in January 2010 as testified by DW5. Here DW5 had, as shown, testified on important aspects about the said donation from the Saudi monarch which are either totally absent from the long and detailed testimony of the accused himself (who was the main guest of the late King Abdullah and the alleged recipient of the financial support) such as on the making of the promise to provide financial support and the timing for the making of the donation, or flatly contradict the evidence of the accused, such as on the requirement for a private account to receive the funds.

[2111]These material discrepancies cut deep into the defence case and very considerably affect and bring into serious question the credibility of the evidence of the accused and particularly of DW5 as to whether there was indeed a promise of private donation promised by King Abdullah to the accused.

[2112]In another fairly recent decision of the Court of Appeal in the case of *Noordin bin Sadakathullah & Ors v Public Prosecutor* [2018] MLJU 1721; [2019] 1 CLJ 748 in addressing the issue of contradictions in the evidence given by the appellant and DW4, a defence witness, the court ruled that the contradictions rendered the defence case untenable. The appellant, who was charged for corruptly receiving gratification, explained that the money he received was meant to be paid to DW4 as payment for a lorry.

[2113]However, contradictions and issues not put to relevant witnesses rendered the defence incredible. Idrus Harun JCA (as he then was) stated thus:

[46] As highlighted earlier, DW4 alleged that when the first appellant could not contact him, PW7 lodged a report with the MACC alleging that the first appellant had obtained the bribe money. PW7 was not cross-examined on this evidence either. It is pertinent to note that it was suggested to PW7 during his cross-examination that he conspired with PW10 to report to the MACC that the money was the bribe money meant to be given to the appellants and that they had victimised the appellants by reporting to the MACC that the money was for bribing them. This line of defence is in direct contradiction with the evidence of DW4.

There was completely no clarification by the defence on this serious contradiction. Such contradiction in our view goes to the credibility of DW4 and renders the defence case untenable.

[2114]For the reasons I have set out, I find that these discrepancies which concern, among others, the pivotal issue of whether King Abdullah did articulate the wish to provide financial support or donation to the accused at the said meeting in Riyadh in January 2010 are sufficiently material to adversely affect the credibility of the witnesses of the defence vis a vis such evidence.

Another discrepancy — Whether DW5 was in Riyadh of 11 January 2010

[2115]There is one other complaint about the evidence of DW5 raised by the prosecution. It is this. DW5 categorically testified the date of the meeting on 11 January 2010. DW4 was not sure whether it was 10 January 2010 or 11 January 2010. DW6 was certain it was between 13 and 16 of January 2010. The accused did not even hazard a date, merely testifying the meeting took place in the month of January 2010. The meeting probably did take place. And the material contradictions concern what exactly transpired at the meeting.

[2116]The prosecution tried to establish that DW5's evidence on the meeting to have taken place on 11 January 2010 could not have been true because DW5 was in Kuala Lumpur on that date.

[2117]The evidence of Nasharudin Amir (DW9), the first investigating officer for the investigations by MACC on the alleged deposit of RM2.6 billion into the personal account of the Prime Minister is relevant. He was asked during cross-examination to verify the actual whereabouts of the accused and also of DW5 on 11 January 2010, the day DW5 testified the meeting with King Abdullah took place in Riyadh.

[2118]DW9 told this court that he had sought the assistance of the current investigation officer for the 1MDB case but he was unable to obtain information on the whereabouts of the accused. DW9 however said he was able to confirm the whereabouts of DW5 through the production of a February 2010 digital edition of the departmental bulletin of Jabatan Kemajuan Islam Malaysia ('JAKIM') (ID800). This, the prosecution submitted, refutes DW5's claim he was in Saudi Arabia on 11 January 2010.

[2119]ID800 features an article stating that DW5 had attended a gathering of all agencies under the purview of the Minister in the Prime Minister's Department (Islamic Affairs) (where DW5 was the Minister then) on 11 January 2010 at the Auditorium of Block D8, Parcel D, Putrajaya. It is reported

in ID800 that at the said event, DW5, as the Minister in charge, had given a speech to all the participants of the event. Several photographs that were taken during the event were also published along with the article which depicted DW5 participating in the event.

Admissibility of JAKIM bulletin

[2120]As such, the prosecution argued that ID800 casts doubt on the credibility of DW5 and raises serious questions as to whether he was a truthful and reliable witness in court when he testified that he was in Saudi Arabia with the accused, DW4 and DW6 on the 11 January 2010. It bears emphasis that DW6, the former Foreign Affairs Minister himself denied that he was in Saudi Arabia on the date given by DW4 of 11 January 2010.

[2121]The defence challenged the admissibility of ID800. The prosecution contended that ID800 is a computer printout and a certificate (ID799) was issued under s 90A(2) of the Evidence Act 1950 confirming that the bulletin was computer generated by JAKIM. ID799 certified that ID800 was produced by a computer in the course of its ordinary use in JAKIM. ID799 was signed by the Assistant Director of the Corporate Communications Unit of JAKIM, who certified that ID800 was produced from a computer, of which he was responsible for the management of the operation of that computer.

[2122]As such, in response to the request by the prosecution to provide evidence as to the whereabouts of the accused on 11 January 2010, the date on which DW5 — the former minister in the Prime Minister's Department Datuk Seri Jamil Khir Baharom testified the accused had an audience with the late Saudi monarch (where DW5 was also in attendance) which allegedly crucially touched on the issue of financial donation, DW9 produced the bulletin, a department publication by JAKIM (February 2010 edition) which featured an article that the former minister in charge of Islamic affairs himself (DW5) had attended a function officiated by the accused on 11 January 2010 in Malaysia. The prosecution also contended that on that 11 January 2010 the accused had officiated the opening of the corporate office of 1MDB. However, DW9 was not able to substantiate this.

[2123]And since the maker of that JAKIM bulletin too was not called, I declined to accept the bulletin as evidence, and marked it as ID800.

[2124]In its submissions at the end of the case, the prosecution invited this Court to revisit the issue of the admissibility of the bulletin.

[2125]Having reviewed the matter, I agree that ID799 is prima facie proof that ID800 is a computer printout for the purposes of s 90A of the Evidence Act

1950. This is pursuant to s 90A(3)(b) of the Evidence Act 1950 which provides that the certificate issued under s 90A(2) is admissible as prima facie proof of all matters stated therein without proof of signature of the person giving the certificate.

[2126]Subsection 90A(3)(b) of the Evidence Act 1950 reads as follows:

> (b) A certificate given under subsection (2) shall be admissible in evidence as prima facie proof of all matters stated in it without proof of signature of the person who gave the certificate.

[2127]Thus ID800 is admissible as a document produced by a computer pursuant to sub-s 90A(1) of the Evidence Act 1950 since the requirements of ID800 being produced by a computer in the course of its ordinary use has been fulfilled by ID799.

[2128]In addition, in the case of *Gnanasegaran a/l Pararajasingam v Public Prosecutor* [1997] 3 MLJ 1 the Court of Appeal explained the application of s 90A of the Evidence Act 1950 as follows:

> On reading through s 90A of the Act, we are unable to agree with the construction placed by learned counsel. *First and foremost, s 90A which has seven subsections should not be read disjointedly. They should be read together as they form one whole provision for the admissibility of documents produced by computers.* As stated earlier, s 90A was added to the Act in 1993 in order to provide for the admission of computer-produced documents and statements as in this case. *On our reading of this section, we find that under sub-s (1), the law allows the production of such computer-generated documents or statements if there is evidence, firstly, that they were produced by a computer. Secondly, it is necessary also to prove that the computer is in the course of its ordinary use. In our view, there are two ways of proving this. One way is that it 'may' be proved by the production of the certificate as required by sub-s (2). Thus, sub-s (2) is permissive and not mandatory. This can also be seen in sub-s (4) which begins with the words 'Where a certificate is given under subsection (2)'.* These words show that a certificate is not required to be produced in every case. It is our view that once the prosecution adduces evidence through a bank officer that the document is produced by a computer, it is not incumbent upon them to also produce a certificate under sub-s (2) as sub-s (6) provides that a document produced by a computer shall be deemed to be produced by the computer in the course of its ordinary use. *It is also our view that the prosecution can tender the computer printout through the investigating officer without calling any bank officer. Therefore, when they adopt this way of proof, then it would be incumbent upon them to establish that the document is produced by a computer in the course of its ordinary use by producing the certificate under sub-s (2). The reason seems to me to be obvious as the investigating officer will be in no position to say that the printout is produced by a computer in the course of its ordinary use, as he is not an officer of the bank.*
>
> In the present case, Zainal — the person in charge of the operations of current accounts — testified that the statement of accounts was a computer printout.

> Therefore, in our view, the first part of sub-s (1) has been proved, ie that the document is a computer printout. It would be superfluous for him to issue a certificate under sub-s (2) when firsthand evidence that 'the document so were produced by a computer' was given by Zainal. It would be superfluous to have a provision such as in sub-s (6) if in every case a certificate must be produced. *It follows, therefore, that such a certificate need only be tendered if an officer like Zainal is not called to testify that the statement is produced by a computer. Then the certificate becomes relevant to establish that the document is produced by a computer in the course of its ordinary use.* (Emphasis added.)

[2129]This decision was applied and approved by the Federal Court in *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613; [2009] 2 CLJ 800 and *Public Prosecutor v Azilah bin Hadri & Anor* [2015] 1 MLJ 617; [2015] 1 CLJ 579.

[2130]It is clear that the Court of Appeal in *Gnanasegaran a/l Pararajasingam* held that the certificate produced by an investigating officer is admissible as proof that the computer printout is produced from the computer in the course of its ordinary use, as sanctioned under s 90A(2) of the Evidence Act 1950. This would mean that the production of the certificate (ID799) is the requisite proof that the bulletin (ID800) was printed in the course of the ordinary use of the computer under the responsibility and management of the Assistant Director of the Corporate Communications Unit of JAKIM, in which a digital copy of the bulletin (ID800) was stored.

[2131]On that basis, there is strictly therefore no requirement to call the Assistant Director of the Corporate Communications Unit of JAKIM, from whose computer, the bulletin (ID800) was generated, as the certificate in ID799 was issued by the Assistant Director of the Corporate Communications Unit of JAKIM himself, namely Mohd Nadzri bin Mustakim, as stated in ID799. In the other words, the certificate (ID799) issued pursuant to s 90A(2) of the Evidence Act 1950 is prima facie proof of all matters stated therein as provided in sub-s 90A(3)(b). The certificate (ID799) is sufficient to establish that the JAKIM bulletin printed and tendered as ID800 was produced by a computer in the course of its ordinary use and thus is admissible. As such both the exhs ID799 and ID800 are thus now converted to exhs P799 and 800 respectively, and become admissible in evidence.

[2132]Notwithstanding the conversion of ID800 into prosecution's exh (P800) (and consequentially ID799–P799) rendering the same admissible under s 90A(1), it should be noted, however, that s 90B of the Evidence Act 1950 provides that in estimating the weight, if any, to be attached to a document admitted by virtue of s 90A, the court may draw reasonable inference from circumstances relating to the document, including the manner and purpose ot its creation or its accuracy or otherwise. Given that the JAKIM

bulletin is a publication which features report of events, which is not unlike newspaper reports, the non-calling by the prosecution of the person who authored the report said to feature DW5 renders only very little weight to be given to the said report.

Further and overall assessment of the evidence of the three witnesses

[2133]The testimonies of the three who had attended the meeting with the accused with the Saudi monarch, when dissected, reveal a number of material inconsistencies.

[2134]First is on the date of the meeting and whether this specific meeting at the Palace which private discussion on the financial gift was said to have taken place occurred on 11 January 2010 or on a date between 13 January and 16 January 2010. The former ambassador (DW4) thought it was either on the 11 January 2010 or 12 January 2010 and the former Minister for Islamic Affairs (DW5) was sure it was on 11 January 2010. But the former Foreign Minister (DW6) said it was between 13 January and 16 January 2010. Similarly, DW4 and DW5 said the meeting with King Abdullah was an unofficial one but DW6 insisted that all meetings involving state leaders are official. The accused on the other hand did not mention any date.

[2135]Secondly, DW4 and DW6 testified that it was the Saudi King who at the meeting expressed his wish to provide financial support, but DW5 who speaks and understands Arabic said that it was the accused who had made the request for such support. In contrast, the accused in his testimony said it was Jho Low who had informed him in the middle of 2010 that the Saudi monarch wished to make personal donations to the accused.

[2136]Thirdly, none of the three had knowledge that it was Jho Low whom the accused said had a good relationship with the Saudi Royalty and who had secured the appointment for the accused to meet with the Saudi King through his 'back channel' efforts. When giving evidence earlier the accused had testified that Jho Low was the conduit between the accused and the Saudi royal family, which was why the accused did not have any communication with the Saudi Royalty about the said donation by the latter to the accused.

[2137]This is somewhat befuddling because on the one hand the accused maintains that the person with the connection with the Saudi Royalty was Jho Low who was the person who helped manage the remittances of the said donations to the accused. On the other hand, however, the three witnesses who were present at the meeting in Riyadh in January 2010, and who gave evidence for the accused, made much of the observation of the interaction between the

two leaders at the meeting, their body language, and what was said by the King to the accused all demonstrated a very close, special and personal relationship between the two.

[2138]This evidence does not at all sit comfortably with the assertion by the accused who seemed to have placed considerable if not absolute reliance on Jho Low vis a vis the management of his relationship with the King and the Saudi Royalty when the accused himself appeared to have a close and direct relationship with the King.

[2139]Fourthly, and this is key, despite the detailed and vivid recollection by DW5 that the Saudi King not only expressed directly to the accused the wish to provide financial support but also that the King even said it would be channelled into a private account of the accused, and notwithstanding DW6 claiming that the accused immediately sought DW5 and DW6's opinion on whether it was proper for the donation funds to be transferred into his personal account (to which DW6 said it would not be an issue since he characterised the support as personal in nature, despite the accused officially being the Prime Minister of a democratic and independent nation), the accused himself, very significantly, did not testify of what transpired at the said meeting to the extent now disclosed by these two former ministers and the former envoy. Neither in his 287 page witness statement; nor in reply to any questions during cross-examination or to any question from his counsel.

[2140]Instead, it bears repetition that in his testimony, the accused gave evidence that it was Jho Low who had told the accused in the middle of 2010 that he got to know that the Saudi King had agreed to provide financial donation to the accused. This flatly contradicts with the evidence of the two former ministers that the Saudi King at that private discussion after conclusion of the meeting had already said his wish to make a gift, even, according to the former two ministers, to the extent of saying that this would be made directly into the personal account of the accused.

[2141]All three witnesses however are consistent in their testimonies that they did not know about the amount to be sent to the personal account of the accused. Nor did any of them know of the actual source of the fund or the party who would be making the transfers. And all three also agreed that they did not know as a fact whether any funds or donation the King was actually sent to the account of the accused.

Whether the early disclosure by the accused in statement to MACC in 2015 consistent with belief of Arab donations

[2142]Another argument of the defence which sought to fortify the defence of the accused's belief of Arab donations is that the accused had disclosed that belief of his that the funds were donations from Arab royalty when his statement was first recorded by the MACC in 2015. The defence highlighted that the investigating officer (PW57) admitted that this was mentioned by the accused but he thought it had no relevance to the case.

[2143]Thedefence submitted that the fact that the belief was disclosed to the MACC at the first available opportunity should be viewed positively as being indicative of a genuinely held belief.

[2144]The defence referred to a recent Federal Court decision in *Maria Elvira Pinto Exposto v Public Prosecutor* [2020] 3 MLJ 21; [2020] 5 CLJ 1, where the accused was charged under s 39B of the Dangerous Drugs Act 1952 after being found to be in possession of drugs at the airport upon her arrival into Malaysia. Her defence that she had been duped into carrying the drugs as part of an internet love scam and that she did not have knowledge of the drugs hidden in the bag she was carrying was disclosed in her cautioned statement.

[2145]Her Ladyship Tengku Maimun Tuan Mat (Chief Justice of Malaysia) concluded:

> [57] Having regard to the fact that the appellant disclosed her defence contemporaneously with the discovery of the drugs and in the light of her explanation as to how she came to be in possession of the drugs, we found that the learned judge was right in concluding that the appellant's defence had successfully rebutted the presumption of knowledge under s 37(d) of the DDA and had raised a reasonable doubt on the prosecution's case. The learned judge was right in holding that the appellant was an innocent carrier.

[2146]I observe however that in the instant case before me, even though the accused did state his belief on the alleged promise of personal donation by King Abdullah to the MACC, this statement taking session took place some months after the controversy on the criminal wrongdoings became public in July 2015. According to DW17 who assisted the then attorney general (DW14) in the review of the investigation papers on this case, the statement from the accused was taken only in December 2015. This cannot be compared with the situation of the drug trafficking case where the accused would have been remanded upon arrest for interrogation and the recording of the cautioned statement. In other words, it cannot be said that in the instant case, the defence was disclosed contemporaneously with the discovery of the alleged offence like stated in *Maria Elvira Pinto Exposto*.

[2147]Furthermore, as the above passage highlighted by the defence also shows, the Federal Court had also considered the explanation of the accused as to how she got to be in possession of the drugs. It is trite that it is imperative that the defence itself is credible. Merely proffering the defence early without satisfying the court of its believability is never sufficient.

[2148]As such, merely disclosing to MACC during the investigation stage that the accused had the genuine belief that the monies in his accounts were the Arab donations received by him which is repeated in his testimony in court is not corroborative of the truth of his evidence. I must refer to the case of *Mohamed Ali v Public Prosecutor* [1962] 1 MLJ 230 where Ong J observed:

> ... As what said in *R v Whitehead* a witness cannot corroborate himself, otherwise it is only necessary for him to repeat his story some twenty-five times in order to get twenty-five corroborations of it. (See also *La Choon & Co v Lim Yam Hong & Co*. ...

Whether the opening of Account 694 and notification to BNM is consistent with belief held by the accused

[2149]The defence submitted that the conduct of the accused after being informed by Jho Low in late 2010 of the impending donation from King Abdullah is consistent with the belief held by the accused of that promise by the late Saudi monarch. Based on his own testimony, the accused said that a decision was made to open a new account to receive the donations and utilise the same towards CSR initiatives that he would identify.

[2150]The accused's reasoning on the opening a new account was so that the funds would not be mixed with his other income and to facilitate the utilisation for CSR. Note however, as I have alluded to earlier, that there is inexplicably no mention in this testimony what DW5 claimed was told by King Abdullah to the accused about the need to open a private account.

[2151]To facilitate the opening of a new account Jho Low, through Joanna Yu (PW54) caused Cheah Tek Kuang (PW50) the Group MD of AmBank to attend at the accused's residence in January 2011. There, the accused informed PW50 that the new account was to receive substantial donations from the Arab royalty. As stated in his own testimony that confirmed this meeting, PW50 advised that substantial foreign remittances would have to be reported and clearance would need to be obtained from Bank Negara Malaysia and the Foreign Exchange Control Department. The accused did tell PW50 to ensure compliance with all rules and regulations.

[2152]The accused testified that he had even on one occasion spoke with Tan Sri Zeti Akhtar Aziz, the then Governor of BNM and informed her about the

donations he was expecting. The accused took comfort in this, knowing that BNM would also receive reports and scrutinise the same and that in the event anything was suspicious or amiss BNM would raise its concerns. In particular copies of the four letters from the Arab royalty on the alleged donations (D601–D604) were also extended to AmBank and BNM. PW50 too in his testimony admitted to have met with the Governor on the opening of Account 694 and the purpose for the same, as indicated by the accused.

[2153]The defence therefore asserted that such evidence demonstrates that the accused had genuinely held the belief that the impending remittances were donations he was to receive from the Arab royalty following from the meeting with King Abdullah.

[2154]Given the facts and evidence of the meeting as related by the accused and the three witnesses who claimed to have accompanied him to Riyadh in January 2010, I have already shown that very serious doubts exist whether King Abdullah had actually made a promise of personal donation to the accused. I have found that it was unreasonable for the accused as the Prime Minister to have assumed that what was claimed to have been told to him by Jho Low about the financial support from King Abdullah was true, accurate and genuine without making inquiries that could have easily been initiated by the accused as the leader of the country. I have also found that the evidence of the three defence witnesses who had accompanied him at the audience with King Abdullah, especially that of DW5 do not help advance the case for the defence, in light of a number of material discrepancies, resulting in the further erosion of the credibility of the accused's defence of belief of the personal donations from King Abdullah.

[2155]As such, his conduct subsequent to that notification of impending remittance from Jho Low, including the opening of Account 694, the meeting with the BNM Governor, would all entirety be self-serving. The accused did tell others such as the BNM Governor and PW50 what he claimed he believed. He was thus pushing the onus of determining whether the foreign remittance was regular or otherwise to AmBank and the Central Bank, if they desired to do so. The accused himself repeatedly said in his testimony that if BNM found anything irregular, the Central Bank would have taken steps to stop the remittances.

[2156]Moreover, the notification to the Central Bank and the submission of the copies of the four Arab letters cannot be construed as voluntary because such would in any event be considered as part of the pre-requisite documentation for exchange control processes for foreign remittances.

[2157]In my view, if BNM had told the accused they found the remittances suspicious, the accused would have easily pleaded ignorance. If BNM did not, like what appeared to have transpired, the accused would continue using that defence of belief of the promise of personal donation made by the late Saudi monarch as a convenient excuse. In either case the constant was that at the material time the accused was also the Prime Minister and the Finance Minister of the country. This must have emboldened the accused to adopt this stance.

Whether the remittances based on the letters (D601, D602 and D603) in 2011–2013 support the existence of the belief by the accused

[2158]In order to strengthen the narrative of the accused on his belief that the funds came from King Abdullah, he testified that from 2011–2013, he was periodically told of remittances of substantial sums of monies in USD into the Account 694 (opened for that purpose) by Datuk Azlin, his late principal private secretary whom the accused believed was in communication with Jho Low on the same. Datuk Azlin also received letters as evidence of the donations being made to him (D601, D602 and D603).

[2159]The accused was informed by Datuk Azlin that these letters were also provided to AmBank directly by Jho Low. The accused also confirmed that save as what were disclosed in these Arab letters in exhs D601, D602 and D603, the accused did not know the identity of the specific transferors and the specific remittance transactions. Nevertheless, the accused was told that all foreign remittances into that Account 694 and the letters (D601, D602 and D603) were at all times duly reported to AmBank, BNM and its Governor. And nothing was ever raised to the accused by BNM at the material time.

[2160]According to the defence, this shows the accused's belief of the remittances from 2011–2013 being genuine donations from King Abdullah. Further the fact that Jho Low was reporting this directly to AmBank revealed that Jho Low was acting for the Arabs and indicated the genuineness of the transactions. In addition, the contents of D601–D603 given by Jho Low were consistent with the donations he believed was from the Saudi royalty.

[2161]The defence also argued that the contents of D601–D603 were also reflected in the fact that the cheques he issued from Account 694 in the years 2011–2013 were honoured as there were always sufficient funds in the account. The accused maintained that ultimately, the belief that he entertained of Jho Low's role as a facilitator of the donations on behalf of the Saudi royalty was fortified.

[2162]I reiterate that in my view, these facts are but a mere manifestation of that familiarand deliberate self-perpetuating approach adopted by the accused

in his assertion of belief that the remittances came from the purported promise of personal donation by King Abdullah to him. I have already found that at its core, at the time of being notified by Jho Low in 2010 of the decision by King Abdullah to make the personal donation, the accused unreasonably but conveniently decided against performing any verification of the factual accuracy of this purported decision by the late Saudi monarch. This, as I have said, already negated the presence of a genuine belief on the part of the accused. The accused instead chose to rely on what was told to him by Jho Low. And this approach of the accused continued throughout the years during which the foreign remittances entered his Account 694, and beyond.

[2163]The notes of proceedings on 8 January 2020 — DW1 record the following:

> S: I am going to, I'm going to. Don't worry. I won't leave anything out. If I do, you can just, okay, right. Jho Low also told you that King Abdullah had agreed to provide you with a personal donation?
>
> J: Yes.
>
> S: Jho Low also told you in mid 2010 that the donation would be coming soon?
>
> J: Yes.
>
> S: From 2011 to 2014, Dato' Sri received substantial donations which you believed are from King Abdullah?
>
> J: Yes.
>
> S: You, Dato' Sri, however cannot confirm that the donations were indeed from King Abdullah, as a matter of fact? That you won't know.
>
> J: I received in good faith.
>
> S : I agree sir. So all, this is a very simple one. You won't know as a fact that whether it is from King Abdullah. That's all I am asking.
>
> J: I assumed it was from him.
>
> S: It's your assumption?
>
> J: In good faith.
>
> ...
>
> S: You assumed that. Okay. And you agree that it was Jho Low's liaison with the Saudi Royal family that resulted in the so called donation being paid into your account?
>
> J: He was, he was a conduit.
>
> S: He was instrumental, I put it this way.
>
> J: He played his part but the King had confidence in my leadership.

S: But he was the one, without his liaison, it is he facilitated, his liaison that resulted in the funds coming in?

J: He facilitated but it was the King who wanted to support my leadership.

...

S: When there was no basis for assumption, because funds were just coming into your account.

J: Yes but there were funds as result of my meeting with King Abdullah.

[2164]It was primarily the words of Jho Low and what he could achieve and have accomplished vis a vis the Saudi royalty that the accused said led him to accept the foreign remittances which he assumed came from King Abdullah in good faith, after the audience in Riyadh where even the accused did not testify the late Saudi monarch mentioned the desire to extend financial support or donation.

[2165]It is pretty much the same here. Again, the accused was told about the actual remittances of substantial sums of cash into his Account 694 by Datuk Azlin and Jho Low. The accused did not get this information from the purported actual donor, King Abdullah. Then the three so-called Arab letters, D601, D602 and D603. These were shown to him by Datuk Azlin. Whoever authored or arranged for the letters did not even honour the accused, as the Prime Minister of Malaysia, to whom the letters were addressed, with receiving them personally.

[2166]Worse, the letters did not come from King Abdullah and as the accused himself testified, he did not know the identity of the specific transferors and the specific remittance transactions. Instead the accused started to spend out of his Account 694 for what he described as CSR activities, in the hundreds of millions of Ringgit Malaysia. The fact that his large spending were supported by the funds remitted in Account 694 cannot be said to be confirmatory of its source being King Abdullah. If nothing else, on the contrary, its sheer amount of deposits alone should have further triggered the accused to make inquiries. He did not.

[2167]In my view, if for a genuine error of judgment (extremely unlikely especially for a Prime Minister) the accused had failed to verify the accuracy of the intention of King Abdullah to grant personal donation as intimated to the accused by Jho Low, his continued failure to confirm the true source of the remittances when he started receiving these huge sums of monies in Account 694 throughout the years 2011–2013 further fortifies the position that he never truly held that belief.

The four 'Arab letters'

[2168]It is apposite that these four letters be subject to greater scrutiny. After all these are relied on by the accused to fortify his defence of belief that the remittances which flowed into his accounts came from Arab royalty, namely King Abdullah himself. The first letter (D601) is dated 1 February 2011 and specified a grant of USD100m. The second letter (D602) is dated 1 November 2011 and mentioned an additional sum of USD375m. The third (D603) is dated 1 March 2013 and refers to the grant of an additional sum of USD800m. The fourth (D604) is dated 1 June 2014 and specifies the sum of GBP50m.

[2169]The original versions of all four letters were not produced in court. The accused claimed he had received them but they were in the PMO which presumably means that he now has no access to collect them.

[2170]All four letters are, on the face of it, signed off by one 'HRH Prince Saud Abdulaziz Al-Saud', and sent from the 'Private Office' of 'Saud Abdulaziz Majid Al Saud' as per the letterheads of these letters.

[2171]I think it is useful to reproduce the contents of at least one of the letters, since the rest largely replicate the first. The first letter (D601) reads as follows:

> RECOGNITION OF CONTRIBUTION TO THE ISLAMIC WORLD
>
> I hope this letter finds you in good health.
>
> I have been following your work recently and I am impressed with the work that you have done to govern Malaysia using Islamic principles and how you are reintroducing Islam to the rest of the world in view of the current perception that many people have since 9/11. Your suggestion to launch the Global Movement of the Moderates during the recent United Nations General Assembly in New York and the 17th ASEAN Summit shows a modern way of dealing with issues on international terrorism and extremist groups.
>
> In view of the friendship that we have developed over the years and your new ideas as a modern Islamic leader, I hereby grant you a sum of United States Dollars One Hundred Million (USD100,000,000) only ('Gift') which shall be remitted to you at such times and in such manner as I deem fit. You shall have absolute discretion to determine how the Gift shall be utilised and I am confident that your actions will continue to promote Islam so it continues to flourish. This is merely a small gesture on my part but it is my way of contributing to the development of Islam to the world.
>
> This letter is issued as a gesture of good faith and for clarification, I do not expect to receive any personal benefit whether directly or indirectly as a result of the Gift. The Gift should not in any event be construed as an act of corruption since this is against the practice of Islam and I personally do not encourage such practices in any manner

whatsoever. This is merely a personal token of appreciation and I am hoping that the Gift would encourage you to continue with your good work to promote Islam around the world.

[2172]The subsequent letters substantially followed the contents of D601 apart from the additional sums of remittance stated earlier. Otherwise the changes are inconsequential. Thus in respect of the title, the second letter includes the word 'significant' before 'contribution', whilst the third and fourth letters followed the second and added the word 'Important' before 'Recognition'. Cosmetic.

[2173]In addition, the second letter refers to the first letter, the third refers to the first and second, whilst the fourth letter (which unlike the first three, mentions remittances in GBP instead of USD), curiously also refers only to the first and the second.

[2174]Further, the second letter mentions that remittances shall be made from the personal account of the writer or his company bank account 'such as Blackstone Asia Real Estate Partners Limited', whilst the third letter refers to another company that is Tanore Finance Corp. No such reference is made in either the first or the fourth letter.

[2175]The issue, I must emphasise is not whether the letters and their contents are genuine but is whether the accused was justified in having relied on them for his belief that the foreign remittances that arrived in droves in his personal accounts (Account 694, and later Account 880) came from King Abdullah. There are in my evaluation, many problems with these letters and the conduct of the accused when considered in the context of the totality of the evidence in this case, especially when tested against the defence of the belief of the accused that the remittances into his accounts came from donations from King Abdullah. I list only ten such problems.

[2176]First, despite and in addition to the failure of the accused to verify with King Abdullah or his KSA officials the truth of the information told by Jho Low in the middle of 2010 that the Saudi monarch wished to make personal donations to the accused, the receipt of the first letter dated 1 February 2011, written not by King Abdullah but one Prince Saud ought to have immediately alerted the accused to make that inquiries to confirm his understanding and belief.

[2177]Secondly, the accused testified that he did not know Prince Saud. The accused also did not know if this Prince Saud is in any way related to King Abdullah. This further made the verification all the more compelling. But the accused did not. The said Prince Saud did not in the letters state that he was

writing on behalf of King Abdullah or the KSA. It was written in the context of a personal relationship, by an individual, said to be a Prince, whom the accused did not know.

[2178]Thirdly, the letters disclose the amount of the said donations or gifts. The first letter (D601) specifies the sum of USD100m or in excess of RM300m. This is a stupendously large sum of money which incredibly did not trigger the accused to make inquiries to satisfy himself as to the legality of the source. Nor was the accused alarmed when the figures became even staggeringly higher, with USD375m in the second letter (equivalent of more than RM1 billion), and a whopping USD800m (in excess of RM2 billion) in the third letter.

[2179]Fourthly, the letters take great pains to emphasise that the gifts should not be construed as corruption and the writer did not expect anything in return. That these letters saw it fit to mention this reflects the suspicious nature of these letters in the first place. Yet the accused, an intelligent person, and the Prime Minister of the country at the time did not see it appropriate or prudent to consult the authorities on the matter. This is despite the fact that 'gratification' is widely defined in s 3 of the MACC Act to include gifts.

[2180]Fifthly, the other aspect which raises in my view very strong suspicion on the genuineness of the donation letters (and consequently whether the accused truthfully believed them) is that despite claiming belief that the funds including RM2.6 billion credited into his Account 694 came from the late King Abdullah, there was never any letter from the accused acknowledging the alleged donation or even thanking the Saudi monarch for the same. And this is despite the accused having actually written two letters to the Saudi monarch during the same period.

[2181]The first letter, dated 11 September 2012 (P795) was written after the dates of the first two purported donation letters (D601 and D602) to the accused. The second letter from the accused to King Abdullah was dated in September 2013 (P796), after the third donation letter (D603). Neither of these letters from the accused to King Abdullah made any mention of the alleged donations.

[2182]The accused did say, but only when cross-examined, that he had thanked King Abdullah for the donations personally. Consider the following notes of proceedings dated 22 January 2020 — DW1:

S: Whatever channel sir, you had not thanked him for the donations, correct sir?

J: Not in this letter.

S: You have any other letters to produce where you thanked him sir? Have you got?

J: No, but when I met His Majesty, I did thank him.

[2183]The defence also suggested that contemporaneous communication between King Abdullah and the accused appeared to be recorded in a letter from the accused to King Abdullah in September 2013 (P796). The defence submitted that reference in the opening paragraph of the letter to 'warm exchanges' in a recent telephone conversation between the two could have featured the expression of gratitude by the accused to the late Saudi monarch then.

[2184]Thus, when re-examined, the accused in notes of proceedings on 3 February 2020 — DW1, had this explanation:

S: ... Yes sir. P796 which is September 2013 letter. Are you with me sir?

J: Yes.

S: By September 2013, well, in your mind March 2013 you received about 680 million US Dollars, in March and April 2013. And by September 2013, you have remitted unutilised donations back. Now this September letter, the first paragraph refers to some telephone conversation that you had, that warm exchanges took place. Can you elaborate a bit on what these warm exchanges are?

J: Well I did thank him for the donation basically.

[2185]The accused's explanation that any mention about the said donations would go against normal diplomatic channel, and that the accused had thanked the late Saudi monarch personally such as in the warm greetings he had expressed in an earlier telephone conversation is clutching at straws and wholly unsubstantiated. Not to mention that this was also not offered in his testimony in examination-in-chief. This is thus a mere afterthought.

[2186]Sixthly, very crucially, in 2013, the accused actually returned a large amount of USD620m after the remittances pursuant to the third letter which mentioned USD800m, on the pretext that this was surplus to the requirements following the conclusion of the 13th General Elections and according to the testimony of the accused, in order to avoid political issues with the accused holding large sums of monies.

[2187]This raises many other issues. For one, the accused therefore recognised that being a leader of a country who was also a recipient of a large sums of monies, more so from foreign sourceswould naturally court attention and controversy. But he did not even seek confirmation of the true source. Not when first told in middle of 2010, nor at any time thereafter.

[2188]Further, even for the return of that exceedingly large sum of money, the accused did not see it appropriate to communicate with the individual whom the accused said he believed was the donor, namely King Abdullah, to explain the reason for returning a substantial amount of the donation. Unusual diplomacy by a leader of a country vis a vis a revered leader of a friendly nation. Seventhly, and this is especially significant, despite the return of the USD620m in 2013, the accused had no qualms accepting further remittances pursuant to the fourth letter (D604) only after a year later in 2014. This was neither solicited nor explained.

[2189]Eighthly, despite the fourth letter in D604 stating the gift amount to be GBP50m, documentary evidence shows only the equivalent of about RM49m or about one fifth of the stated amount was actually remitted into the personal account of the accused. Strangely, the series of remittances for this RM49m, said to be from King Abdullah included a transfer of a comparatively paltry but peculiarly specific amount of £2,216.01 (or RM11,567.57). Like for the other earlier letters which the accused relied on, it would have been most unlikely that despite knowing the amount to expect from the remittances as stated in the letters, the accused did not suspect something went amiss as the funds which he actually received was significantly less than promised.

[2190]Ninthly, whilst all four letters stated that it was for the accused to decide how to utilise the funds at his discretion, the thrust of the letters was that the actions of the accused would 'continue to promote Islam, so it continues to flourish' and the gifts was the writer's 'way of contributing to the development of Islam to the world'.

[2191]On the other hand, the considerable part of his spending out of these remittances were primarily for what the defence characterised as for 'CSR initiatives'. Whilst these undeniably include disbursements to promote the well-being of the less fortunate and other social and community projects, there were mainly channelled to political organisations who organised these activities. These are political parties under the Barisan Nasional (BN), the registered coalition party led by the accused which then governed the country. As such, the stated CSR expenses cannot be said not to have been for the accused's political advantage and benefit.

[2192]The accused thus seemed to have referred back to the wishes expressed by King Abdullah to him at the audience in Riyadh in January 2010 where the late Saudi monarch had allegedly informed the accused of his wish that the accused would continue to lead Malaysia in moderate fashion which does not promote extremist and militant tendencies. The four letters did not mention this, focussing instead on motherhood statements on development of Islam in the world.

[2193]Tenthly, the accused had in purported reliance of the letters and all their infirmities, expended on the foreign remittances for a colossal total amount of about RM1 billion. Money trail however, also confirms that funds from these remittances had been utilised to settle credit card charges for personal purchases and expenses made in Hawaii and Italy, despite the accused claiming that the purposes of the remittances into his account was to help him continue his leadership of the country (the purported wish of King Abdullah), and to promote the development of Islam (the wish expressed in the four letters). The argument of the defence that these blatantly personal expenses, such as for the purchases of jewellery, constituted less than 1% of the total spending truly rings hollow when the total spending was more than RM1 billion, a mind boggling sum by any standard.

[2194]Given such evidence and circumstances, in my view this must irrestistably mean that the defence that the accused believed the remittances originated from the late Saudi King was at best an elaborate but weak fabrication. It is very difficult not to characterise the entire narrative of the defence of the 'Arab donation' as a poorly orchestrated self-serving evidence. This defence on the knowledge which is premised on the belief of the accused on the alleged Arab donation monies simply cannot hold water.

The admissibility of the four 'Arab Donation' letters

[2195]I have mentioned that the defence produced four letters to show that the donations from Arab Saudi as promised by the late King Abdullah was deposited into the accused's accounts from 2011–2014. The said letters were marked as D601, D602, D603 and D604.

[2196]The prosecution submitted that the said letters are a classic example of documentary hearsay as the defence had failed to prove that they were admissible as evidence to the truth of its contents. The defence has failed to prove the circumstances of how the letters were prepared and who in fact prepared and signed them.

[2197]The identity of the person who signed all the letters, namely stated to be Prince Saud Abdulaziz Al-Saud, remains unproven as no clear evidence was produced to prove his identity and whether the letters were indeed signed by him. He was not called to testify. In such circumstances the exhs D601–D604 cannot be admitted to establish the truth of the contents of the alleged donation letters.

[2198]I agree that the said letters were marked only to show the existence of such letters, as the same were produced to the bank, but not as to the truth of the contents. The authenticity of the four letters are unproven and no originals

were tendered before this court. The accused testified he had seen the originals but as stated earlier, did not have them with him.

[2199]In any event both the prosecution and defence had agreed that the letters were tendered not as proof of genuineness or authenticity but to acknowledge that photocopies of them had been furnished to AmBank. In the former Federal Court decision in the case of *Datuk Haji Harun bin Haji Idris & Ors v Public Prosecutor* [1978] 1 MLJ 240 Wan Suleiman FJ explained the position in this manner:

> D41 (id) was not admitted because, the judge said, the accountant who made this report had not been called. We agree with counsel for the appellants that it should have been admitted — not, however, as evidence of the truth of its contents but simply as a document which was presented to and was in the hands of persons attending the AGM. We shall deal with the significance of this document in its proper place below.

[2200]As such even though a hearsay document such as the four letters have been marked as exhs (D601–D604), in this instant, the authenticity of the document is still required to be proved.

[2201]After all, again, it is well-established, in that in the leading Privy Council case of *Subramaniam v Public Prosecutor* [1956] 1 MLJ 220 it was in an often-quoted passage from the judgment, authoritatively held that:

> Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.

[2202]The defence did call several witnesses in its effort to show the authenticity of the letters, or at least to suggest that the accused believed them to be genuine. The defence sought to rely upon the evidence of Nasharudin Amir (DW9), Fikri Ab Rahim (DW12) and Tan Sri Dzulkifli Ahmad (DW17) to prove that the said letters were signed by Prince Saud Abdulaziz Al-Saud.

[2203]The prosecution on the other hand submitted that the said witnesses could only verify attending the meeting with three Arab men at a large house in Riyadh, one of whom was purportedly Prince Saud Abdulaziz, but they could not verify the actual identity of the person to be Prince Saud. The same person also did not personally confirm either orally or in the written statement recorded by the MACC that all the said letters (D601–D604) were indeed issued by him.

[2204]Before I analyse the evidence of these three witnesses, I should first, for the record, refer to an application made by the defence in respect of DW9.

Application to compel a witness to be interviewed by the defence

[2205]After the sixth witness for the defence finished his testimony and was released by this court, learned lead senior counsel informed the court of the status pertaining to the intended seventh witness (who later was called as the ninth witness). It was highlighted that the defence had sought the issuance of a subpoena against an MACC officer who had previously been a former investigating officer for the 1MDB, which had been duly served on the intended witness by the investigating officer of this SRC case (PW57). The intended witness is neither a prosecution witness nor one of the witnesses offered to the defence at the close of the prosecution case.

[2206]The prosecution had also earlier mentioned to the court that the prosecution would make the necessary arrangement to secure his attendance as a witness. The prosecution, though PW57, even arranged for the intended witness to attend an interview session with the defence team as requested by the latter.

[2207]However, the intended witness decided not to attend the interview and refused to meet the defence team for this purpose. Nevertheless, the intended witness attended court in adherence to the subpoena and was ready to be sworn in as a witness.

[2208]The defence then applied to this court for an order to compel the intended witness to be interviewed by the defence team, before the defence could decide whether or not to call the intended witness to the witness stand. The defence essentially argued that the right to interview a witness is part of the constitutional right of an accused to a fair trial.

[2209]This application is resisted by the prosecution who submitted that the court has no power to compel a person who is not an offered witness to be interviewed by the defence. It is a generally accepted principle that there is no property in a witness because it is the primary duty of the court to ascertain the truth and must therefore have the right to every man's evidence (see Lord Denning MR in *Harmony Shipping Co SA v Saudi Europe Line Ltd* [1979] 1 WLR 1380). This same principle is also understood to give rise to another general proposition that it is therefore open to a counsel for either party to any court proceedings to interview or take statement from any witness or prospective witness.

[2210]Case law authorities have however made the true application of this

principle, and its limit, reasonably coherent. In *Public Prosecutor v Ramli bin Yusuff* [2008] MLJU 1098, the High Court held that the defence may only interview the prosecution witnesses who are offered to the defence after they are offered. This decision is noteworthy as it examined the principle of no proprietary rights in witnesses and enunciated the following propositions of law of importance to the question now before this court.

[2211]First, this principle does not confer on the defence an unrestricted right to interview witnesses for the prosecution.

[2212]Secondly, a witness has the right to silence and should only be interviewed if he consents to the interview. This is in consonance with his constitutional right of freedom of speech subject to any law that compels him to speak such as contained in s 112 of the Criminal Procedure Code.

[2213]Thirdly, unlike the police under s 112 of the CPC, the accused does not have a right to take a statement from a person by compulsion for the purpose of his trial.

[2214]Fourthly, where a witness has not given a statement under s 112, he may voluntarily agree to be interviewed by the defence but the accused cannot compel that witness to attend interview and answer the questions in that session, including by applying the court to issue an order to such effect.

[2215]Fifthly, where a witness has given a s 112 statement, which is a privileged document (*Husdi v Public Prosecutor* [1979] 2 MLJ 304) to which the defence is not entitled, any consent by the witness to an interview by the defence is a breach of that privilege.

[2216]Sixthly, when a prosecution witness is not called, there is no duty to supply his statement to the defence because in that situation a material witness must be offered to the defence who will be in a position to interview the witness.

[2217]Seventhly, in all cases the right of the defence to interview prosecution witness only arises if the prosecution has waived the privilege over his witness statements and the witness agrees to be so interviewed.

[2218]*Public Prosecutor v Ramli bin Yusuff* concerns an unsuccessful request by the defence to interview prosecution witnesses before commencement of trial. In contrast, in the instant case before me, the application is made during the defence stage and is in relation to an intended witness who is neither a prosecution witness nor offered to the defence. No statement was recorded by

A the MACC from this intended witness.

[2219]However, as stated above, the case of *Public Prosecutor v Ramli bin Yusuff* also dealt with the situation not unlike presently where Clement Skinner J (as he then was) stated that where a witness has not given a statement under s 112, B he may voluntarily agree to be interviewed by the defence but the defence cannot compel that witness to attend interview and answer the questions in that session. The High Court emphasised this specific point by stating that the defence cannot even apply for a court order to direct the witness who refuses to be interviewed. In my view, this position represents the law on question to be C determined by this court. For two reasons.

[2220]First, *Public Prosecutor v Ramli bin Yusuff* does not identify the witness who has not given a s 112 statement as a prosecution witness. It was thus in reference to any person whom the defence is interested to interview and who D has not had his statement recorded by the police.

[2221]Secondly, and more fundamentally, in all situations, whilst the overriding reason for non-interview where a statement has been recorded is the E issue of the statement being privileged, which should therefore not be violated by the interview (unless not called by the prosecution but offered to the defence or unless the privilege is waived by the prosecution), in cases where there is no such statement, the question is entirely whether the witness consents to be interviewed. This should similarly apply to an intended witness for the defence F who is neither a prosecution witness nor offered to the defence. He is perfectly entitled to seek the protection of the right to silence, by withholding consent and refusing to be interviewed.

[2222]The law on criminal procedure in our country does not specify the right G of the defence to compel an intended witness for the defence to be interviewed by the defence team prior to the latter deciding whether or not to call the intended witness to the stand. The power of the court concerning witnesses is only provided in the law in s 34 of the CPC which compels attendance in court by the issuance of a subpoena. This statutory provision does not extend to H compelling a witness subpoenaed to attend court to first be interviewed by the defence which subpoenaed the witness.

[2223]If the intended witness is either a prosecution witness or one offered by the prosecution, the defence may understandably wish to ascertain by way of an I interview if the person can be called as a witness to give evidence relevant to the defence. However, if he is neither a prosecution witness nor one offered by the prosecution, but is intended to be the defence's own witness, there must have been some basis known to the defence which makes him a potential witness for the defence in the first place. Plainly, the defence in any trial should only call as

witnesses whose evidence to be elicited is known to the defence. Any interviews, if expected and requested by the defence may still be conducted if the intended witnesses consent to be interviewed. But not if the intended witness refuses.

[2224]There is no law which can direct the intended witness to be interviewed by the defence other than s 34 of the CPC which compels him to appear and testify in court. Any such law would only serve to encourage 'fishing expedition' and promote inefficiencies in the trial process.

[2225]In the upshot, in my judgment it was already stated in *Public Prosecutor v Ramli bin Yusuff* that where a witness has not given a statement under s 112, he may voluntarily agree to be interviewed by the defence but the accused cannot compel that witness to attend interview and answer the questions in that session, including by applying the court to issue an order to such effect. In my view this proposition represents the law on the question to be determined by this court. The intended witness is neither a prosecution witness nor offered to the defence. The fact that he is a public officer and the former investigating officer for another case does not change this position.

[2226]In any event the right of the accused to a fair trial is not compromised because he maintains the fundamental right to call the intended witness who is still subject to the subpoena and under a duty to testify truthfully if chosen to be called by the defence.

[2227]The investigating officer was then later called by the defence as its ninth witness.

The testimony of Mohd Nasharudin Amir (DW9)

[2228]Mohd Nasharudin Amir (DW9) is an MACC assistant commissioner, who was the initial investigating officer for the 1MDB case when the file was opened in the middle of 2015, based on report 300/2015, in particular in respect of the RM2.6 billion which was said to have been deposited into the account of the accused, until another officer took over soon after the 14th General Elections in May 2018. The witness has always been involved in investigative functions, albeit in different departments of MACC since he joined the institution in 1999.

[2229]His testimony revolved around the trip to Saudi Arabia to confirm the authenticity of the four letters (which were dated between 1 February 2011 and 1 June 2014) (exhs D601–D604) linked to the alleged donation that the Saudi Arabian royalty — specifically the late King Abdullah — had given to the accused. This is supposed to be a crucial piece of evidence because the mainstay

of the defence of the accused, especially in relation to the RM42m alleged to have been remitted into his accounts is that he had thought that the monies in his accounts were donations from the Saudi Royalty, as I have highlighted earlier, at least two of his former Cabinet ministers (but curiously not the accused himself) claimed the same to have been intimated to the accused by the late Saudi monarch at a meeting in January 2010.

[2230]The trip by DW9 to Saudi Arabia took place between 27 November 2015 and 29 November 2015, and he was part of a five-man delegation which included a deputy public prosecutor, Dzulkifli Ahmad(DW17), MACC Deputy Chief Commissioner Datuk Azam Baki and other MACC officers namely DW9's immediate superior then, Fikri Ab Rahim (DW12), and Mohd Hafaz Nazar as part of the 1MDB investigation team.

[2231]DW9 gave evidence that on 29 November 2015 he did record a statement supposedly from the individual whose name was stated in the four Arab letters as their signatory, namely Prince Saud Abdul Aziz Malik Abdul Aziz al-Saud at a huge mansion which was assumed to be a royal palace, in Riyadh. Based on the information stated on the statement itself (which the witness was allowed to have sight of in order to refresh his memory, with no objection by any of the parties) the place was the Palace of Abdullah Abd Aziz Saud in Riyadh.

[2232]Nevertheless, the person who actually attended the statement taking session was not the said Prince Saud but his legal representative by the name of Mohamad Abdullah Al Koman who spoke in English and signed the statement on behalf of Prince Saud.

[2233]The delegation was told that Prince Saud had 'immunity' and would not sign off on the statement. As such even though DW9 stated that the statement was consistent with the four donation letters marked D601–D604, the person who actually confirmed this before MACC recording officer was not in fact Prince Saud even though the statement was said to be attributed to Prince Saud.

[2234]The witness was however uncertain if the man whom they had met at the said palace and introduced as one Prince Saud was actually a prince. He recalled that the passport of the man said to be Prince Saud was briefly shown to the Deputy Chief Commissioner of MACC who led the delegation but no copies were allowed to be made. In fact, when asked if he was certain that Prince Saud was in the palace at the material time, DW9 said that there were several Arab individuals but he could not ascertain if any of them was Prince Saud.

[2235]The witness also testified at the said palace, and to his surprise, one Eric Tan Kim Loong was also present, and his statement was also later recorded by MACC at the same place. According to MACC investigation, Eric Tan was said to be an associate of Jho Low (see further below). A

[2236]However, Eric Tan had pre-prepared his written statement and that the statement recording session did not include any follow up questions from MACC recording officer. His statement had therefore been prepared in advance to be accepted as a statement recorded by MACC. DW9 agreed he did not know who actually prepared the statement and confirmed that there was no interrogation or the usual question and answer process with Eric Tan at the session which lasted only for 20 minutes. B C

[2237]Both the statements were recorded by MACC officer, Mohd Hafaz Nazar, but DW9, as the investigating officer was 'in and out' of the room in the said palace whilst the statements were being taken. D

[2238]DW9 confirmed that it was his colleague Mohd Hafaz Nazar who took the statements from Abdullah Al Koman on behalf of Prince Saud, as well as from Eric Tan. After the sessions ended, all were treated for dinner at the palace, which finally ended around 10pm. E

[2239]DW9 further confirmed that apart from the statements taken from the two at the said palace, the MACC did not procure any documents to support the veracity of the four letters on the said donations (D601–D604). Thus, the admission on the authenticity of the letters on the donations did not come from the Saudi royal who purportedly signed the four letters but his legal representative. F

[2240]When re-examined, the witness admitted that as the investigating officer he was not satisfied with the statement said to be taken from Prince Saud, but he merely followed instructions. His superiors were also there and he did not then or at any point thereafter receive any instructions to arrange for further statements to be taken. G H

[2241]The witness also testified that before the statement recording sessions, the entire delegation had been invited to perform *Umrah* — the mini-pilgrimage at Mecca where everything was arranged by the Saudi host, including hotel accommodation, private jet flight to and from Jeddah, fully escorted drive to and from Mecca, and the convenience of performing the pilgrimage at the Holy Mosque befitting the status of a special state guests of the Royalty. I

The testimony of Fikri Ab Rahim (DW12)

[2242]The twelfth defence witness was a senior assistant commissioner Fikri Ab Rahim (DW12), another witness from MACC and was the investigating officer (DW9)'s superior. He was also part of the delegation which flew to Riyadh at the end of November 2015 to investigate the authenticity of the four donation letters. His testimony is consistent with that of DW9 in respect of the special treatment extended to them by their Saudi host befitting of official guests of the Kingdom.

[2243]More pertinently, DW12 also testified that an alleged close associate of Jho Low, Eric Tan was already in what DW12 considered as a palace, when the delegation arrived to record the statement of Prince Saud. Three Malaysian lawyers were also already there, one of whom was Datuk Selva Mookiah, and DW12 agreed, when suggested to him that the one other was Francis Ng Aik Guan, but could not confirm if the other was one Rishwant Singh. The witness stated he did not know for whom the latter two lawyers were representing.

[2244]When suggested by the prosecution that it seemed strange that for a very high-profile case like this (which would have demanded strict confidentiality in the investigation process), the witness did not know why the Malaysian lawyers were also present at the place MACC investigators went to in Riyadh, DW12 merely explained that they did not go to the statement recording room but were already at the said palace when DW12 and the rest arrived. The witness confirmed that he did not ask them or other parties either.

[2245]The witness confirmed that the MACC investigating officer through the recording officer eventually only managed to interview Prince Saud's attorney who gave the statement on the latter's behalf. He testified that the attorney, who was identified as Mohammad Abdullah Al Koman, also ended up signing the statement because it was claimed that Prince Saud didn't want to, on account of his 'immunity'. DW12 also said in no uncertain terms that Prince Saud was never present in the room where his statement was recorded and he was unsure where Prince Saud was. He only assumed that Prince Saud was in another room at the same premises.

[2246]However, DW12 said he saw the passport of Prince Saud but not the rest. DW12 maintained that he did not know Prince Saud or who actually signed the four donation letters.

The further testimony of Tan Sri Dzulkifli Ahmad (DW17)

[2247]As mentioned earlier, DW17 is Tan Sri Dzulkifli Ahmad who at the material time was in a team of DPPs instructed by the then Attorney General

(DW14) to review the investigation papers on SRC and the RM2.6 billion transferred into the personal accounts of the accused. The witness was overseeing the working level task force on the 1MDB and SRC investigations on the instructions of the new attorney general. The former attorney general, Tan Sri Abdul Gani was replaced on 27 July 2015 by former Federal Court judge Tan Sri Mohamed Apandi Ali (DW14).

[2248]DW17 was appointed as the Chief Commissioner of MACC on 16 August 2016 and later opted for early retirement in August 2018 and now has his own legal practice.

[2249]The witness told the court that he first got involved in the probe into the SRC's RM42m and the RM2.6 billion cases when he was instructed by the attorney general to travel to Jakarta with MACC officers in late October 2015 for MACC to record the statement from the former SRC's chief executive, Nik Faisal. DW17 claimed that Nik Faisal had requested for the presence of an AGC representative to ensure that the warrant of arrest which had been issued against Nik Faisal would not be executed.

[2250]There was no further involvement in the matter upon DW17's return from Jakarta until the attorney general directed that he accompanied an MACC delegation to Riyadh towards the end of November 2015. The purpose of the trip, as just mentioned, was for MACC to investigate on the four Arab donation letters.

[2251]DW17's account of the trip to Riyadh is consistent with those made by the two MACC officers, DW9 and DW12. This included the special treatment received by the delegation, the *umrah* privilege, the statement-taking sessions at a well-guarded palace, the presence of three Malaysian lawyers at the said palace, the appearance of three princes, claimed to be Prince Turki, Prince Saud and Prince Faisal, and the delegation being led by MACC deputy chief commissioner.

[2252]The witness confirmed he was not involved in the process of recording the statements from either Eric Tan or Prince Saud (albeit through his legal representative Mohammad Abdullah Al Koman). DW17 testified MACC did have a look at the passport of Prince Saud but was not allowed to have it photocopied. DW17 was also shown both the statements then and again studied them later as part of the IP.

[2253]The defence highlighted that DW9 did confirm that in the statement of Prince Saud, which was in fact recorded from Mohammad Abdullah

Al-Koman, acting as attorney and agent of the said Prince Saud, there was mention that the four letters of D601, D602, D603 and D604 were related to donations from Saudi royalty.

[2254]The defence further contended that despite the statement of the said Prince Saud not being recorded and signed by him, the evidence of DW9, DW12 and DW17 on the surrounding circumstances provides adequate facts to infer that the contents of the statement are attributed to Prince Saud, which include the following:

(a) the events relating to the entourage being treated as state guests and were escorted by police and other officially to perform the *Umrah* on 28 November 2015 correspond that the entourage were dealing with officials from KSA;

(b) the identity of Prince Turki was not in dispute as DW12 himself was familiar with Prince Turki from the investigations of the MACC; and

(c) DW12 and DW17 both confirmed that when the entourage arrived at the Hall in the Palace:

(i) Dato' Azam Baki had informed Prince Turki, Prince Faisal and Prince Saud that the purpose of the MACC's presence was to verify whether the D601, D602, D603 and D604 letters were from Prince Saud;

(ii) the Princes were asked to show documents verifying their identities so that a statement could be recorded;

(iii) thereafter, the Princes agreed to show the entourage their passports but copies thereof could not be made as the Princes claimed immunity;

(iv) DW12 sighted the passport of the person introduced as Prince Saud and the passport and picture verified that he was indeed Prince Saud. The passport number was eventually recorded in the statement and was a diplomatic passport; and

(v) the entourage was informed that Prince Saud's statement could not be taken from him personally as he had immunity, but Prince Saud was agreeable for his evidence to be given through his appointed agent and attorney, Mohammad Abdullah Al-Koman.

[2255]However, I find it quite manifest from the evidence of DW9 that Prince Saud, said to be a member of the Saudi Royal family, and the person who signed the four letters never confirmed his identity except that he showed his passport to Dato' Azam and to DW12. The authenticity of the passport was thus never confirmed and the statement given to MACC was made on behalf of Prince Saud and not signed by Prince Saud himself. It also goes without saying that the

nature of the relationship of the gentleman introduced as Prince Saud to King Abdullah is unknown, if any existed in the first place. A

[2256]DW12 also confirmed that he does not personally know Prince Saud and that no supporting documents were acquired or received from the Arab parties during the statement recording session to verify that they were responsible for the remittances into the personal accounts of the accused. B

[2257]Further, DW12 could only identify Prince Saud from the passport that was shown to him there but he could not verify the authenticity of the said passport. DW12 also agreed that if the passport shown to him was false, he would not be able to confirm the identity of that Arab individual as being Prince Saud. C

[2258]DW17 did instruct the MACC officers to check the identity of Prince Saud but he himself did not view Prince Saud's passport while he was there. DW17 testified that he was not involved when the statement of Prince Saud was being recorded. He also said that Prince Saud did not sign the statement personally because he claimed to have immunity and was told that he had instead instructed his attorney to sign on his behalf. D E

[2259]The statement purportedly obtained by MACC from Prince Saud is riddled with infirmities rendering it not admissible in law. First it was signed by another person and not by the person who allegedly made the statement. And the person who purportedly gave the statement too did not testify. Secondly, the statement does not have any supporting documents whatsoever to show its veracity despite the whole purpose of the trip by MACC to Riyadh to determine the authenticity of the four letters. Thirdly, the excuse that Prince Saud could not sign the statement as he enjoyed immunity is wholly unverified. Any immunity he enjoys, if at all, extends to only immunity from criminal prosecution and not to signing a statement to an investigative agency. F G

[2260]Fourthly, the statement uncommonly did not have the usual question and answer session between the person from whom the statement was taken and the recording officer. Fifthly, the incongruity of the entire episode is best demonstrated by the fact that despite alleged to be the person who signed the letters in D601–D604, and according to DW9 confirmed by his legal representative in the statement to MACC, the said Prince Saud himself refused to sign any statement that confirms that the letters in D601–D604 were indeed his letters of donation issued to the accused. It is thus no surprise that the defence too, to its credit, did not attempt to admit the MACC statement signed by the agent to Prince Saud. H I

[2261]The evidence given by DW9, DW12 and DW17 is patently insufficient to find that the contents of the statement recorded and signed by Mohammad Abdullah Al-Koman was the statement of Prince Saud. Nor does it state any nexus between the three Princes and Jho Low whom the accused testified to have been the conduit for the donations. In any event, this statement recorded under the name of Prince Saud but signed by Al-Koman was never tendered before this court. And above all that, the defence also did not call the MACC officer Hafaz bin Nazar, who recorded the statement from the said Mohammad Abdullah Al-Koman to confirm the contents of the statement. The same is therefore inadmissible evidence in this trial.

[2262]In its attempt to bolster the defence of the accused, the defence has even clearly failed to prove the authenticity of the four letters in D601, D602, D603 and D604. This further severely weakens the case of the accused, particularly on his claim to have honestly believed that the funds in question came from King Abdullah.

The special case of the fourth 'Arab letter' (D604)

[2263]I should discuss this letter (D604) in some detail because of two primary reasons. First the remittances which arose from this letter came in 2014 in the accused's Account 880 which appeared to have coincided with the time line related to the arrival of the SRC funds in Accounts 880 and 906 of the accused on 26 December 2014 subject to the CBT and money laundering charges.

[2264]Secondly, it is because the defence asserted, in advancing the defence of honest belief of the accused that the funds came from King Abdullah that it still forms part of the alleged Arab donations *even though* this letter came after the accused had returned the USD620m by way of a letter in P60(17). The argument of the defence is that since the first three Arab letters (D601–D603) were all incoming for the accused to spend at his discretion, then this fourth Arab letter (D604) must be the same as the circumstances prevailing earlier — so the defence claims — and continued to be the same.

[2265]But I have stated earlier that evidence shows that the circumstances in 2014 were very different. Central to this is the accused's own admission, as supported by documentary evidence that the accused had returned the unutilised Arab funds of USD620m apart from the RM162m which he retained in Account 880, being one of the three then newly opened accounts. This is crucial. Evidence records however that all of this RM162m was used up by September of 2014.

[2266]According to the accused, in the middle of 2014, Jho Low informed Datuk Azlin of the fourth donation letter (D604). As I have alluded to earlier, this is odd since the accused had sent back the donations received in 2011, 2012 and 2013 because after the 13th General Elections, the funds became surplus to the requirements. It was extremely peculiar for King Abdullah to have decided to give the fourth donation of £50m as stated in the letter (D604) when the accused had returned a bulk of USD620m only the year prior and considering that the accused had not solicited the same.

[2267]The accused himself testified that he returned the funds in 2013 and that if he had the need for funds in future, he could always approach King Abdullah for the same. In the notes of proceedings dated 4 February 2020 — DW1:

> S: Then my learned friend suggested with regards to this, your testimony that you returned the unutilized portion of the donation because you were not comfortable keeping it and you thought it was a gesture of goodwill. My learned friend then suggested you didn't have to return the money. I mean the money is already with you. And you said no. You thought it was a goodwill gesture and in the event you needed further support that will be taken into account. Then my learned friend suggested ya but if you are going to expect further donations after that, why return the money? Can you just clarify with us? What was your state of mind or put in another way, in your mind why, why return it? Somebody has given you a substantial portion of donation why give it back?
>
> J: As you know, we just completed the General Elections and utilization of the monies were specifically to ensure continuity of the current Government. I was personally not very comfortable with such large sum of money lying in the account. And I thought it would be as I mentioned, a good and sincere gesture to return the monies. Bearing in mind that the ... of my close relationship with King Abdullah. I was very confident that if there was a significant requirement in the near future, then I could approach him for additional donations. Being in a lot of money in the banking system, the problem of confidentiality would arise and did not want this you know to be known outside because of sensitivities. So therefore ...

[2268]It is in my view very compelling that this fourth Arab donation letter (D604) cannot be the basis of any donation from King Abdullah in 2014 because the accused did not approach the Saudi monarch for further funds after the return of USD620m the year earlier. Neither is there any evidence of any basis given by anyone for this sudden and unsolicited donation. There is, as mentioned earlier, no contact between the true donor and the accused before or after the arrival of the funds.

[2269]Nevertheless, it is manifest that evidence in the form of bank statements of the accounts of the accused point irresistibly to the true reason for the remittances, which also establishes why the funds could not have been donations. This is because the funds would suddenly appear — as if on

fortunate episodes of fortuity and serendipity — in the personal accounts of the accused at the exact moment it was needed, usually when the account balance was very low.

[2270]It will be readily appreciated that reference to the MT103 remittance forms/SWIFT forms (D586(1)–(12)) when read together with the bank statements of the three accounts of the accused (in P109, P110 and P270) will reveal that the funds flowed in at the time when the balances were low and were in need of more funds for utilisation by the accused. The trend is unmistakable, as the table (attached as Annexure A to the reply submissions of the prosecution) of the incoming foreign remittances showing the balance in the accused's accounts before credit and the current balance after credit.

[2271]Further testimony of the accused as in the notes of proceedings dated 23 January 2020 — DW1 shows the following:

> S: Yes, so we will now look at the 2 million that is credited to 906, P110. If you look at P110 on June account. You look at 23rdof June, the same day.
>
> J: 23rd June.
>
> S: Yes. Credit transfer 2 million as per instructions of your mandate holder. Correct sir?
>
> J: Yes.
>
> S: And before this 2 million came in as I told you yesterday you were in dire straits financially. You only had 1050.13 correct sir?
>
> J: Yes. That's what it says here.
>
> S: If it says here that means that is what is in your account sir.
>
> J: Yes. That's what I mean.
>
> S: We're not talking about somebody else's account. So Black Rock Commodities sent this money quite timely? Would you say?
>
> J: It would appear yes.
>
> S: And after these monies of RM2million came in, from the 23rd June to the 27th June, you issued some five cheques correct sir?
>
> J: Yes.
>
> S: I am putting it to you, these are monies paid into your account disguised as Arab donation sir, by Jho Low, at your request?
>
> J: No. I disagree
>
> S: Alright I'll now take you to the next transaction in October. Big sum. 30 million. A very big sum. We've seen it. I've showed you how it came in. On 23rd October you would see there's credit transfer Vista Equity 30,320,250. Correct sir?

J: Yes.

[2272]The accused even confirmed that the fourth donation pursuant to the letter in D604 had timed their respective arrival of funds perfectly on more than one occasion to cover the shortages in the funds available to the accused, as the notes of proceedings dated the same day of 23 January 2020 — DW1, shows:

S: The date sir, as you would see the RM30 million from Vista Equity came in on 23rd October. On the same day 23rd there's a debit transfer of 20 million. Correct sir?

J: Yes.

S: And we'll show you where it went to. Please look at P110. If you look at P110 which is account 906. On the same day 23rd October RM15 million, it says there credit transfer, from your, internally, RM15 million went into 906. Correct sir?

J: There is a credit transfer on 23rd October.

S: Yes on same day. All were happening on the same day.

J: Okay. Alright.

S: So this RM15 million went in. And before the RM15 million came in sir, lo and behold, there was a debit of 10,344,000.00. Correct sir?

J: Yes.

S: So again, the Arabs have timed it perfectly to rescue the shortage of funds in your account. Correct sir? It would appear so?

J: Well the donations came at a...

S: They all will come at the right time, sir. Alright. And you issued cheques, you issued some three cheques thereafter, you issued several cheques after that, correct sir? Because first, it was overdrawn and after this came, you issued several cheques which from October, you look at November it carries on. Correct sir? It facilitated these funds, it facilitated you in issuing out cheques sir. Correct sir?

J: When I was told there is enough balance, I issued cheques. Yes.

S: I am putting it to you sir, not that you were told, you knew you had enough balances. That's why you issued cheques?

J: No, I didn't see the account. I was told.

...

S: Yes. This one is P109, sir. It's a different exhibit you have to look at. I think that one you have not referred to hitherto. It's not a very active account. Alright, okay, 898. P109. If you look at it you can see on the 23rd October credit transfer per from your Y1MY, that is your 880 account was credited. Correct sir?

J: 23rd October?

S: Yes, 23rd October sir. 2014.

J: There's a RM5 million. Yes.

S: Yes. The RM5 million. 20, 15 went there, 5 came here. And you would see again, all phenomenal coincidences, that the account only had 893.50. Correct sir? Before the RM5 million came in?

J: Yes, that was a very small, insignificant balance ya.

S: And after this RM5 million injected into your account, you issued various cheques. In fact if you want to look at, its there so I don't want to trouble you. You issued cheques from 24th to 27th of October and 6th to 12th October, November amounting to some RM7.6 million dollars. If it's there, it's there, sir. You agree?

J: Do I have to look at November?

S: Okay, you can see in October, there is RM million, there is 500 thousand. You turn to November, you see RM1 million, 80 thousand, 100 thousand and RM4 million. Correct sir?

J: I see October. Couldn't get November.

S: The page behind it sir.

J: Okay. Alright.

S: Correct sir?

J: Yes.

...

S: Yes, and if now you look at 898 on 11th December, you will see the credit of RM6 million?

J: Yes.

S: And again, phenomenal coincidence, when this RM6 million came in, your account was overdrawn by RM5 million, RM 5.876million. Correct sir?

J: That's right.

S: And with this money coming in, the account from overdraft of 5.8, the account was regularized, correct sir? At a credit balance of 123 thousand. Correct sir?

J: It became a credit balance, yes.

[2273]It is not open to dispute that the deposit of funds into the accounts of the accused had the real and immediate effect of regularising the said accounts exactly when it was most needed. Because of that they could not have possibly come from King Abdullah. It is simply mind boggling to accept that the accused refused to find out the balance in his account that he never knew the balance in his account for five years and the source of this ever flowing fund into his account at the material time. The only inference that can be drawn is

Jho Low was arranging the funds for the accused, as requested, with the assistance of Dato' Azlin and Nik Faisal.

[2274]It could not have been that the late Saudi monarch had information on, let alone was monitoring the balances in the accounts of the accused. That is preposterous and ridiculous. In truth this is yet another series of orchestrated remittances of funds into the accused's accounts to ensure he has the funds to enable the accused to write cheques out of his accounts. It could also not have been from the Saudi royalty because despite the letter (in D604) specifying a promise of a gift of £50m, only £10m (or RM49m) found its way into the account of the accused, *sans* any explanation. And to think that the defence wanted this court to accept that this was the arrangement between the Ruler of KSA and the Prime Minister of Malaysia.

[2275]As I have stated earlier, there are other aspects about this fourth donation that render the defence of the accused wholly devoid of merit and logic. I repeat that the six batches of remittances pursuant to D604 arrived when the balances of the accused's accounts were very low. Secondly, one of the remittances pursuant to the fourth letter was a mere £2,216.01 (or RM11,567.57 then). Thirdly, two of the donations were stated in the relevant documents as loans. The defence's argument that it was a mistake and should rightfully be a donation is interesting since the pertinent SWIFT form is filled by the sender — Vista Equity — of the remittance and it is that party who filled up the SWIFT form in D586(9–10) and D586(11–12) to decide the purpose of the transfer being for a loan.

[2276]Fourthly, the £50m promised in the letter in D604 was never fully remitted. After six batches of the so-called Arab donation were given pursuant to the letter, the balance of £40m never arrived. There is absolutely no evidence of any information about this. At the same time, the funding by Jho Low also came to an end on 6 February 2015 when Jho Low informed PW54 that the RM10m deposit (subject to the present charges) was final as he disclosed in the BBM chat saying 'that's final'.

[2277]In my judgment, from the evidence it is quite plain that the accused could not have honestly believed the Arab royalty donation story, especially vis a vis the fourth letter fund (D604) to present him with a defence that he did not know of the RM42m paid into his account because he thought he was spending on the Arab funds. As has been made demonstrably clear, this defence is unsustainable because it is wholly contrived.

[2278]Quite apart from the remittances pursuant to the three letters in D601, D602 and D603 during the years 2011, 2012 and 2013 which the defence argues the accused honestly believed to have been from King Abdullah —

which I have shown to be unsupported by evidence and plainly false, the remittance in 2014 was even more indefensible because the accused himself had in 2013 returned the balance USD620m to the donor whom the accused did not know but conveniently assumed to have been King Abdullah after the conclusion of the 13th General Elections, and for the other questionable aspects surrounding this alleged fourth donation, which have been highlighted.

[2279]It seems that as for the fourth letter (D604) despite the full amount of funds promised never materialised, the accused seemed contented for as long as the exact amount of funds needed arrive at the moment it was most needed to address insufficiency of balances in his accounts. The accused appeared unperturbed as to why the full amount was not flowed into his account, much less if it was actually from King Abdullah. Further, the letter in D604 does not name the entity that will be giving the funds to the accused unlike the previous donation letters.

[2280]As such the contention that the accused had a bona fide belief of the purported Arab donations arriving in 2014 through the fourth letter in D604 as being consistent with the earlier received funds during the years 2011–2013 does not pass muster the threshold of not only the requisite evidential support but also of the basic logic and common sense.

[2281]The accused had stated that Jho Low was again the conduit to facilitate the incoming funds from Saudi Arabia for the fourth letter, as he had been throughout the duration of all the other so-called Arab letters. The accused had agreed that when he returned the USD620m in 2013, it was sent to Tanore Finance Corporation as that entity was named inthe letter (D603). As the notes of proceedings dated 4 February 2020 recorded:

> S: Why do you say that because one of the questions that was asked in cross-examination was concerning the identity of this Tanore Finance Corp and we also know that later on in 2013 you returned about 620 million US Dollars. My learned friend put to you that Tanore Finance Corp is an entity owned by Jho Low. You said you were not or you couldn't confirm. Then why is it at that time you, at that time in 2013 you were of the belief that Tanore Finance Corp is a party connected to the Royal family?
>
> J: I believe because that was based on the donation letters. And my instructions to the bank was to return the money and returned the money where it came from. So, I assumed all along that Tanore Finance is part of the outfit of the Saudis.
>
> S: If I can then take you to that letter, D603 please. Yes, what on this letter would have or could have led you to the state of belief of Tanore Finance Corp sir?
>
> J: Yes, because it came as part of the commitment of King Abdullah to me. So as to how it has been transmitted, I assumed in good faith, that everything came from whatever set up they have. And it may not be directly from the Ministry of Finance.

[2282] The accused had thus returned USD620m of the alleged Arab donation to an outfit unknown to the accused. The entire belief and judgment of the accused on the remittance of funds is predicated on the letter such as in D603 which was coincidentally handed over to him by Jho Low, as confirmed by the accused himself in his re-examination, as found in the notes of proceedings dated 4 February 2020 — DW1, as follows:

> S: But what does the letter actually say with regards to how the monies were supposed to come in?
>
> J: It did say it is directly from my personal bank account or through my instructed company bank account such as Tanore Finance Corporation.
>
> S: Now your testimony is this letter also you received it from Azlin who in turn received it from Jho. So everything now points back to Jho Low. These letters come from Jho Low. Information comes from Jho Low. Why is it that you, you in the state that you were the Prime Minister of the country, you were the Finance Minister of the country. Quite a powerful man according to my learned friend, which I must agree to. But why the tremendous belief that Jho is actually the conduit of the Royal family?
>
> J: Because he has a special relationship with the Saudi Royal family and he has made a number of things happen. And through his back channels we found that, that is true or that was true. So that is why at that time we had no doubt that in our mind that this came from part of King Abdullah's outfit.
>
> S: By, by 2013 by the state of this letter, this was, there were three or this is the third year running.
>
> J: Yes.
>
> S: Third year running?
>
> J: Yes.
>
> S: 2011, 2012, 2013?
>
> J: Right.
>
> S: Now the previous years, the letters that were shown to you are in the same format. Also came from Jho right?
>
> J: Yes, and they were delivered as you know quite a number came directly from the Ministry of Finance.

[2283] The accused had full trust in the letters purportedly given by the Saudi Royal family even though he had actually received the four Arab letters from Jho Low and not from the actual donor. The identity of the Arab donor was stated in the letters as Prince Saud Abdulaziz Al-Saud but as I have mentioned, there is no evidence to show that this said person was a member of the Saudi Royal family or a representative of the King. Nor was there any evidence to show that the accused had knowledge this person was indeed a member of the Saudi Royal family.

[2284]In fact the accused testified that he did not know the person. Even the evidence of DW9, DW12 and DW17 who went to Riyadh to ascertain the authenticity of the donation letters and the donor could not confirm the same. That the identity of the donors stated in the MT forms (D788, D789 and D790) tendered through Nazarudin Md Kasim (DW7) of AmBank shows that the funds were transferred from sources within Saudi Arabia, namely Prince Faisal bin Turki and the Ministry of Finance, Riyadh does not address the true question which is whether they were donations from King Abdullah. The four Arab donation letters have not been proven and consequently the fact of the King's donation also remains unproven.

[2285]But the MT forms themselves show several other sources of funds that are not from within Saudi Arabia. In D789, the name Blackstone Asia Real Estate Partners appears as a donor of USD169.99m in 2012 whereas in D790, the name Tanore Finance Corp appears as a donor of USD681m in 2013. Yet there is no evidence to show that both these entities were related to the Saudi Royal family or to any other source of funds within Saudi Arabia. At the same time neither did the accused confirm that he knew these entities or that they were related to the Saudi Royal family apart from the fact that the names of some of these entities were stated in the purported Arab letters, which in any event have not been proven as authentic.

[2286]It therefore fits in with the narrative that given that the accused had tasked Jho Low to ensure that funds were available in his accounts for the accused to utilise, the accused would have certainly known that the funds in his account were not from the Saudi Royal family but from sources arranged by Jho Low. Indeed if the funds were from Saudi Royal family then it could have simply been credited into the accused's accounts, without the necessity to task Jho Low to source for the funds.

[2287]Even the return of the USD620m to the outfit known as Tanore Finance Corp in 2013 was based entirely on information received from Jho Low. Not to any sources within the Saudi Royal family, let alone King Abdullah. Thus in the notes of proceedings dated 23 January 2020 — DW1, it is recorded as follows:

> S: Basically return of unused donations in 2013. Dato' Sri as a prelude to the questions, I'll just have to set the facts. Some are already in court but without that I can't ask the question. Dato' Sri will agree with me, Jho Low was involved on your behalf for the return of the Arab funds to the sender?
>
> J: I believe so, yes.
>
> S: In fact Dato' Sri told Dato' Azlin, according to your evidence, to inform Jho Low to get the name of the party to whom the remittance is to be sent? Correct sir?
>
> J: Yes.

S: And the return of the funds to the named party being Tanore Finance Corporation. Correct sir? **A**

J: Yes.

S: And the return of the funds to the named party being Tanore Finance Corporation. Correct sir? **B**

J: Yes.

S: The funds were to be returned...

J: Yes. **C**

S: To Tanore Finance Corporation?

J: Tanore, yes.

S: To Tanore Finance Corporation?

J: Right. **D**

[2288]I however agree with the submission of the prosecution that the purpose of sending the remittances must surely if indeed this were a donation, to be decided by the sender and not by the representatives of the recipient, who was the accused. As mentioned earlier, the assertion of the defence that 'loans' was not the intention of Nik Faisal and Jho Low is irrelevant because they were not the sender. The acts of Jho Low and Nik Faisal were for the benefit of the accused himself, and this would include their actions to rectify the contents of the MT103 remittance forms/SWIFT forms (D586(1)–(12)). **E** **F**

[2289]I should point out that the accused did in his testimony say that he considered Jho Low to have been acting more on behalf of the Saudi Royalty. He was the conduit for the remittances on the alleged donations. In my view, based on the evidence, this appears to be conveniently asserted by the accused to address the absence of any communication with King Abdullah or any KSA sources about the alleged donations. Yet the accused also testified that Jho Low was responsible to ensure sufficiency of funds in the accused's personal accounts. In truth it is manufactured and designed to tailor the defence of the accused. But it serves only to confuse and further throw even more doubts on the defence of the accused. **G** **H**

The presence of Eric Tan Kim Loong at the palace in Riyadh and the MACC statement recorded from him **I**

[2290]The defence also asserted that the fact that Eric Tan was also at the palace where the statement from Price Saud was taken is significant. This is because of the claim that he was appointed as the nominee of King Abdullah and the Saudi royalty.

[2291]DW9, DW12 and DW17 all confirmed that on 29 November 2015, Eric Tan was also present at the palace and a statement was also recorded from Eric Tan on the same day (D601) by MACC officer, Hafaz bin Nazar. DW9 testified that Eric Tan was already at the palace when the MACC delegation arrived to meet with individuals identified as Prince Turki, Prince Faisal and Prince Saud. Eric Tan appeared to be able to freely communicate with the said Princes without much protocol and his behaviour also reflected that he was familiar with the conditions in the Palace. This was recorded by the notes of proceedings on 4 March 2020 — DW12:

S: Siapa yang lebih senang berkomunikasi?

J: Saya melihat Tan Kim Loong ada bercakap dengan Putera Raja tersebut.

S: Bagaimana cara dia bercakap? Adakah sama dengan pihak MACC bercakap?

J: Agak mesra.

S: Dia agak mesra dengan anak-anak raja tersebut?

J: Ya. Saya tidak melihat protokol.

S: Tidak melihat protokol. Apa maksudnya? Cuba terangkan dengan lebih lanjut. Ini mustahak. Kita nak tahu macam mana.

J: Saya dimaklumkan, sekiranya nak bercakap dengan Putera Raja ini mesti ada protokol di sana. Tidak boleh tanya sewenang wenangnya. Jadi saya nampak Tan Kim Loong boleh bercakap dengan Putera Raja terus menerus.

S: Dia seorang ke? Atau orang lain pun boleh?

J: Saya tidak nampak. Saya tidak pasti yang lain tapi saya melihat Tan Kim Loong bercakap dengan Putera Raja.

S: Tan Kim Loong ini daripada apa yang Encik Fikri boleh lihat, bagaimana kelakuan beliau dalam istana tersebut?

J: Biasa.

S: Biasa bagaimana?

J: Saya melihat dia seperti sudah biasa dengan keadaan istana tersebut.

S: Ah, I see. Seperti dia sudah biasa dengan keadaan?

J: Kami agak terlalu berjaga-jaga, agak risau bagaimana. Tapi saya melihat dia biasa berbanding kami.

S: Dia biasa dalam keadaan tersebut?

J: Ya.

[2292]The statement by Eric Tan to MACC was then tendered and marked as D801. D801 is noted as having been recorded on 29 November 2015 at 'the

Palace of King Abdullah' in Riyadh. The material contents of D801, as fairly summarised by the defence are as follows:

(a) Eric Tan Kim Loong had been appointed to act as nominee for King Abdullah, Prince Faisal, Prince Saud and other members of the Saudi Royal Family ('Principals') by way of a letter dated 3 August 2009;

(b) as nominee, Eric Tan dealt with assets designated by the said named Principals in accordance with their instructions and general directions;

(c) a further letter dated 28 September 2015 from Prince Turki also reaffirmed Eric Tan's capacity as nominee and further confirmed that Blackstone Asia Real Estate Partners Ltd and Tanore Finance Corp were entities set up by Eric Tan in accordance with the instructions and directives of the Principals; and

(d) Eric Tan confirmed that the remittances from Blackstone Asia Real Estate Partners and Tanore Finance Corp had been undertaken by him as directed by his Principals.

[2293]The defence therefore argues that the said statement of Eric Tan (in exh D801) and the evidence relating to Eric Tan's dealings with the Saudi royalty corroborates the accused's belief on the Arab donations since among others the remittances in 2012 were from Blackstone Asia Real Estate Partners, which the statement stated was an entity by which the Saudi royal family had directed remittances to be undertaken. Similarly, the 2013 remittances being from Tanore Finance Corp and the return of USD620m to it on Jho Low's confirmation of the same is also mentioned in the statement of Eric Tan. And indeed, Blackstone Asia Real Estate Partners and Tanore Finance Corp are also named in the letters in D602 and D603 as being companies through which the donations may be made.

[2294]It is correct that DW12 testified that he had observed that whilst Eric Tan as well as the lawyers appeared familiar with the place and at ease in their interaction with the three claimed to be Princes (whom the witness said were introduced by the gentleman said to be Prince Turki, Prince Saud and Prince Faisal), the delegation were told to observe strict protocol and not to address the members of the royalty directly. It was left to the MACC deputy chief commissioner to speak on behalf of the delegation in the session prior to the statement taking.

[2295]Earlier, DW9 confirmed that Eric Tan was now a wanted person who could not be located. He confirmed that email from the RMP in P713 to the Hong Kong Police dated 17 June 2018 to assist in the apprehension of Eric Tan who was stated in the email to have been sighted at a location in Hong Kong.

[2296]DW9 also agreed during cross-examination that one Datuk Selva Mookiah was also present at the said palace on 29 November 2015 but despite being the investigating officer, the witness did not know the reason for his presence. He said he was not told whether Datuk Selva Mookiah was the lawyer for Eric Tan. Nor was the witness aware whether there were other Malaysian lawyers at the palace at the same time.

[2297]DW17 also stated he had no knowledge of the three Malaysian lawyers at the said palace, merely saying there were already there when the delegation arrived, and that he felt no necessity to find out. This seems consistent with the evidence of the two MACC officers.

[2298]It is quite demonstrably clear that other than the investigating officer (DW9) who appeared hesitant to testify when asked by the defence whether the statement purportedly taken from Prince Saud confirmed that donations were given to the accused and the four letters were authentic, the other witnesses familiar with the issue such as DW9's superior (DW12) and the accompanying DPP (DW17) seem comfortable to testify that the trip to Riyadh had confirmed the narrative on the donations.

[2299]This in my view is surprising, for the Arab donation story is the core of the defence of the accused, where the contention is the accused did not know that the funds which flowed into his personal accounts were from SRC, believing instead that they were part of the donation from King Abdullah.

[2300]Despite being the agency tasked with the objective of investigating the genuineness of the donation narrative, MACC and DW17, as the accompanying DPP, did not seem interested to establish the reason for the presence of not one but three Malaysian lawyers at the very place their investigation was supposedly being carried out. The lack of firmness in dealing with the identities of the said three princes, the inability to procure any other documents substantiating the alleged donation and above all the easy acceptance of the statements said to have been taken from Eric Tan and Prince Saud, especially the latter who did not even personally attend the recording session let alone signed the statement given by his legal representative, without the need for further statement there or thereafter is especially perplexing.

[2301]It is no less mystifying that DW17 testified that they were actually quite fearful then, which I take as being overwhelmed with almost everything being under the dictates of others — of those who were connected to the powerful Royalty in a foreign country.

[2302]That was the context of the statement recordings sessions for both the said Prince Saud and Eric Tan. In addition, the statements in their final form

are not of the usual format, as testified by DW9. They are not in the standard question and answer format. Instead the statements of the two were prepared in advance before being produced to the MACC. And of course, Prince Saud and Eric Tan were not called as witnesses in this trial. They could not even be cross-examined. For the former, the defence did not even attempt to have the statement attributed to Prince Saud admitted in evidence. For the latter, it did, successfully.

Application to admit statement of Eric Tan

[2303]Towards the end of the testimony of DW9, the defence asked that the prosecution furnish it with a copy of the statement recorded from Eric Tan. This statement by Eric Tan according to the defence as shown earlier, contained the confirmation that Eric Tan represented the Arab royalty in the ownership of Tanore Finance Corp. It was also highlighted to DW9 by the prosecution that the Interpol red notice (P723) dated 7 December 2018 summarised the alleged crime of Eric Tan and that he had served as the proxy for Jho Low in numerous financial transactions.

[2304]The prosecution objected to this request by citing a number of reasons, none of which I found especially compelling. It was argued that there was no conclusive evidence that it was Eric Tan's statement, and that nobody knew who had prepared the advanced statement as well as that there was no evidence that he ceased to be traceable since the witness was only the investigating officer for the 1MDB matter until May 2018. Further, it was argued that even if the statement was technically admissible the court still retained the discretion to exclude it, if the evidence would only be of trifling weight, on the authority of the High Court decision of *Public Prosecutor v Paneerselvan & Ors* [1991] 1 MLJ 106.

[2305]I am constrained to agree with the arguments of the defence, given that the statement by Eric Tan was not denied by MACC as having been recorded by its recording officer. DW9 himself, the investigating officer then, as well as his superior DW12 did not dispute that. Furthermore, the prosecution had earlier tendered and now shown to DW9 the two exhs P713 and P723 which documented that Eric Tan, and Jho Low were wanted by Malaysian authorities who even sought help of other countries through Interpol. There is no suggestion, let alone evidence that they had been arrested or that the red notice against them had been withdrawn. They thus remained untraceable. And as testified by DW9, at least during his time as the investigating officer, there was no instruction for further statement should be recorded from Eric Tan.

[2306]In addition, I do not think the High Court decision of *PP v Paneerselvam* assists the prosecution in this respect. The prosecution relied on

A that passage in the judgment of Edgar Joseph Jr J (as he then was) which had quoted Lord du Parcq in a decision of the Privy Council in *Noor Mohamed v R* [1949] AC 182, as follows:

> The matter however does not rest there for once it is accepted that the evidence objected to is relevant and admissible, then it is for the judge to exercise his discretion and reach a fair balance having regard to the interests of both the prosecution and the defence. In other words, I must next consider whether in the exercise of my discretion I should exclude the statements as corroboration under s 157 on the ground that their probative value is outweighed by its prejudicial effect in accordance with the principles enunciated by Lord du Parcq in the Privy Council case of *Noor Mohamed v R* [1949] AC 182. In that case Lord du Parcq said:
>
> > ... in all such cases the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interests of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the judge.

[2307]It was the submission of the prosecution that the statement recorded from Eric Tan would only offer a trifling weight and should rightfully be excluded. This therefore meant that the prosecution should not be directed to supply the defence a copy of the same.

[2308]However a full appreciation of the abovementioned passage would lead a discerning reader to readily conclude that its true focus is on the discretion of the court to exclude relevant evidence — particularly in that in a criminal case, where the court always has a discretion to disallow evidence if the strict rules of admissibility operate unfairly against the accused (see also the judgment of Lord Goddard CJ in the Privy Council decision in *Kuruma, Son of Kaniu v R* [1955] 2 WLR 223).

[2309]Lord du Parcq in *Noor Mohamed v R* clearly enunciated in unequivocal fashion that even if technically admissible, it would be unjust to admit the same if it is gravely prejudicial to the accused.

[2310]This principle is thus designed to protect the rights of an accused to be afforded a fair trial. It has little to do with the rights of the prosecution, if at all. And nor did the prosecution here in the instant case show how the admission of the statement of Eric Tan would in any manner be prejudicial to its case. Given that it should not be excluded, there was no basis to deny the supply of

the statement to the defence, considering that efforts by the authorities to trace Eric Tan as a witness had not been successful.

[2311]Accordingly I allowed the application of the defence under s 32 of the Evidence Act 1950 to have a copy of the statement recorded by the MACC from Eric Tan to be furnished to the defence. This was marked as D801, following the request by the defence to have it admitted in evidence.

[2312]I agreed to admit the statement recorded by Eric Tan by MACC under s 30(8) of the MACC Act pursuant to s 32(1) of the Evidence Act 1950 which states as follows:

> 32 Cases in which statement of relevant fact by person who is dead or cannot be found, etc, is relevant
>
> (1) Statements, written or verbal, of relevant facts made by a person who is dead or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases:
>
> (i) when the statement was made in the course of, or for the purposes of, an investigation or inquiry into an offence under or by virtue of any written law; ...

[2313]This statutory provision renders what is otherwise hearsay to be admissible, but only upon fulfilment of the conditions stated therein.

[2314]Usually it is the prosecution who seek to admit statements taken from individuals that have since gone missing, in order to prove its case. But s 32 is neutral as to the identity of the party seeking admission of the statement, provided the conditions stated therein are satisfied. The key, as is readily obvious from the language of s 32(1) is that it contains the words 'cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable'.

[2315]Case law has established that sufficient evidence must be adduced to demonstrate that despite all efforts made, the person in question could still not be traced. In the High Court decision in *Public Prosecutor v Lee Jun Ho & Ors* [2009] 3 MLJ 400; [2009] 4 CLJ 90 (affirmed by the Court of Appeal in *Public Prosecutor v Lee Jun Ho & Ors* [2011] 6 MLJ 220), the application of this s 32 was clearly explained in the following terms:

> [13] Section 32 of the Evidence Act 1950 is an exception to the general rule that hearsay evidence is inadmissible. Under s 32(1) of the Act, one of the circumstances under which such a statement becomes admissible is where the person who made the statement 'cannot be found'. This was the basis upon which the prosecution tried to invoke when they attempted to produce and tender ID66 and ID67 For a

witness to be clothed as 'who cannot be found' within the meaning of s 32(1) of the Evidence Act 1950, such determination is a finding of fact, of which the onus is upon the prosecution to prove.

[14] From facts adduced, I find that the police has failed to take all reasonably practicable steps to trace the witnesses. In fact there was not a single proactive effort by the police to procure the attendance of such material, relevant and important eye-witnesses.

[15] There was no attempt to fully utilize the prevailing and available provisions of the Criminal Procedure Code, in order to secure the attendance of the witnesses. The police failed to invoke the provisions of s 47 and 49 of the Criminal Procedure Code; which empowers the court to issue a warrant in lieu of or in addition to summon a witness and to require that person to execute a bond for his appearance in court. The police also failed to invoke the provisions of s 118(1) of the Criminal Procedure Code whereby the police officer who desires any person, who is acquainted with the circumstances of a case, to be present in court, shall require that person to execute a bond to appear at the trial court. The prosecution also failed to utilise the provisions of s 396 of the Criminal Procedure Code whereby the public prosecutor may apply to court for any witness of any seizeable offence that intends to leave Malaysia and that witness's presence at the trial to give evidence is fatal for the trial, to be committed to the civil prison until trial or until he shall give satisfactory security that he will give evidence at the trial.

...

[17] In view of the above circumstances especially of the omissions by the police to take all reasonably practicable steps in tracing the witnesses, and guided by the following cases (on s 32(1) of the Evidence Act):

PP v Mohamad Said [1984] 1 MLJ 50; [1982] 1 LNS 115;

PP v Mohd Jamil bin Yahya & Anor [1994] 1 CLJ 200;

PP v Gan Kwong [1997] 2 CLJ Supp 433;

PP v Chow Kam Meng [2001] 7 CLJ 387;

PP v Mogan Ayavoo [2004] 3 CLJ 623; and

PP v Norfaizal Mat (No 2) [2008] 8 CLJ 576.

[18] I hold that the prosecution has failed to meet the requirements and the prerequisites of s 32(1) of the Evidence Act 1950. I accordingly ruled that the statements, ID66 and ID67 are inadmissible, as evidence for the prosecution.

[2316]As I have mentioned earlier, the prosecution cannot deny that the statement from Eric Tan exists and that the prosecution had earlier tendered two exhs P713 and P723 which documented that Eric Tan, and Jho Low were wanted by Malaysian authorities who even sought help fromthe enforcement authorities of other countries to apprehend the two, through Interpol. Furthermore, crucially, and unlike the precedent cases on this subject of sufficiency of reasonable efforts, the MACC was only able to have his statement

taken in Riyadh (which could have been arranged with his lawyers given the presence of three Malaysian lawyers at the same palace, like in the case for Nik Faisal in Jakarta, as testified by DW17) and not in Malaysia where the authorities could have utilised the available provisions of the Criminal Procedure Code in order to secure the attendance of potential witnesses.

[2317]It should nevertheless be said that even if the s 30(8) statement of Eric Tan is admitted in evidence under s 32 of the Evidence Act 1950, as I have done, the weight to be given to it is an entirely different matter. In *Public Prosecutor v Jitweer Singh a/l Ojagar Singh* [2014] 6 MLJ 222; [2014] 1 CLJ 433 the Federal Court said thus:

> [38] That s 112 statement of Khairuddin was untested by cross-examination. It did not have the weight of sworn testimony. Yet it was evidence. It could not be discarded. Weight must still be given to it. It turned out that the evaluation of weight was not a Gordian Knot. We tested the facts asserted by Khairuddin against the established facts.

[2318]In any event, however, the statement given by Eric Tan to MACC refers to several documents but these were never provided to the MACC. There is therefore no way of ascertaining whether the documents referred to by him, especially the letters allegedly from the King and Princes and other members of the Saudi Royal family which purportedly appointed Eric Tan as the nominee of the Saudi Royals even existed in the first place.

[2319]These were conveniently not produced. Eric Tan also claimed in the statement to MACC to have been authorised to transfer out and receive funds in relation to Blackstone Asia Real Estate Partners and Tanore Finance Corp, the entities which were sending funds into the accounts of the accused, allegedly on the instructions of the Saudi royalty. Again, this was a mere statement with no substantiation.

[2320]In addition, despite allegation of the association of Eric Tan with Jho Low from MACC investigations, the evidence of DW9, DW12 and DW17 does not show any link between Eric Tan who was said to have been at the palace in Riyadh when the delegation from MACC arrived, and Jho Low. The accused however clearly identified Jho Low as the conduit in relation to the Arab donations. Not Eric Tan. The evidence in the statement of Eric Tan suggests Eric Tan was the conduit, given his alleged position as the nominee for the Saudi royalty. The investigations by MACC as stated earlier on the other hand have named him as a proxy for Jho Low. There is no clarification to this obscurity. This casts further doubt on the veracity of the statement, justifying this court ascribing little and trifling weight on the same.

[2321]I only therefore attach very little weight to the statement of Eric Tan in exh D801. I reiterate that he did not submit to the usual question and answer session, agreeing only to provide a pre-prepared statement to the MACC in Riyadh. His statement is no less self-serving and conveniently provided a narrative that the Arab royalty, including King Abdullah had appointed him as their nominee. No reasons were given. No documents were provided in support. And neither did the defence manage to subpoena him to help advance the defence of the accused.

Whether the return of the unutilised RM620m to donor after the 13th General Elections supports the belief of the accused

[2322]Another argument raised by the defence to support its position that the accused held the belief that the foreign remittances into his Account 694 came from King Abdullah is the fact of his returning the bulk of the unutilised donations amounting to USD620m. The accused testified that after the 13th General Elections, and by July 2013 there was still substantial amounts left in Account 694 in excess of RM2.1 billion. In order to avoid political issues which could arise if information of such substantial sums was leaked, the accused decided to return USD620m.

[2323]The accused said he asked Datuk Azlin to check with Jho Low on where the Saudis wanted the funds returned to. Jho Low subsequently confirmed that the Saudis wanted the funds to be remitted back to Tanore Finance Corp which was the transferor of the funds in 2013 and which was also named in the letter in D603.

[2324]The accused had for this purpose executed the letter in P60(17) which confirms his intention for the entire transactions to be reported to BNM. The letter, which the accused believed had been prepared by AmBank with the assistance of Jho Low, was copied to the Group MD of AmBank (PW50) as he had been the person who was liaising with BNM and the Governor.

[2325]The defence maintained that the decision of the accused to return the bulk of the unutilised funds after the completion of the 13th General Elections is corroborative of his belief of King Abdullah's wishes as expressed to the accused during the January 2010 meeting.

[2326]I have already examined this argument earlier. But I will address this further. In the first place, I would think it is noteworthy that the accused testified that he returned the USD620m because he wanted to avoid political issues on his having substantial sums of monies in his personal account. This is probably the only admission of some uneasiness on the part of the accused at the material time about the alleged donation from King Abdullah. Even

though the concern was more about the fact of his holding such colossal sums of cash, and not on the source, it cannot be denied that they — the source and the large sums — are inextricably intertwined.

[2327]If it were true that the accused had some concerns about the large sums, that must have arisen from some deliberation on his part as to whether having such large sums in his personal account could be justified, politically if not also legally. And in that deliberation process the obvious question on the source of the funds must surely have been considered as well. The accused must have then concluded that it would be best that the bulk of the sums leave his account.

[2328]If the accused truly believed that King Abdullah had given the personal donation for the purpose that was mentioned at the Riyadh meeting there is no good reason why the funds had to be returned after the 13th General Elections. The late Saudi monarch did not mention anything about elections. The following was recorded in the notes of proceedings on 22 January 2020 — DW1:

> S: And I am saying such a donation that His Majesty deemed fit to be given to you to manage this country for that purpose is a continuing exercise sir? It doesn't come to an end, correct sir?
>
> J: Correct, but the major requirement was during the election.
>
> S: I am putting it to you. That's our case, correct sir?
>
> J: But I'm telling you, the major requirement was for the General Election.
>
> ...
>
> S: So all I'm asking sir just as you have fairly put your thing, I am saying that these funds were not given for the purpose of General Elections? Is that correct or is not correct?
>
> J: Was not specifically, but to ensure that there is continuity of the same Government which indirectly means for the purposes of General Election.

[2329]And even if King Abdullah had expressed preference for Malaysia to continue be helmed by the government led by the accused, such unutilised funds could have for instance been transferred to the federal consolidated fund or any other account at the Treasury and allocated to government agencies which formulate and organise projects and activities for the wellbeing of the country and her citizens, consistent with the alleged wishes of the late Saudi monarch. But it was not.

[2330]The accused's explanation on the return of the funds does seem a strange way of treating a very generous donor, what more in the context of a

relationship between leaders of two independent countries. In that after a personal donation of an extremely large sum had been received, the recipient decided to return a significant portion of it, on the pretext that he had no further need for the funds (despite it being a gift), and to avoid controversy, but at the same time expressed confidence of additional donations from the same donor should any requirements arise in the future. And here the accused testified he believed the donor was King Abdullah, the Ruler of KSA.

[2331]Worse, as mentioned earlier, the accused did not even contact King Abdullah himself whom he said he believed was the provider of the large foreign remittances entering his Account 694 in order to explain the reasons for him returning the USD620m (not to mention, as stated earlier, the absence of any confirmation or acknowledgment of receipt to begin with). An explanation that King Abdullah would have more than deserved. Or even to anyone in the office of the Saudi monarch for that matter. All these, as if the analysis thus far has not been made abundantly clear, can only give rise to the irresistible conclusion that the accused could not have held the belief that the foreign remittances came from King Abdullah.

[2332]Again, as stated earlier, reliance was placed on Jho Low, this time to arrange for the return of the funds. Indeed, the defence even argued that the accused's reliance on Jho Low was very much part of the accused's perception and belief by that stage that Jho Low was acting on behalf of the Saudi Royalty and was their conduit. The following was recorded in the notes of proceedings on 4 February 2020 — DW1:

> S: Why do you say that because one of the questions that was asked in cross-examination was concerning the identity of this Tanore Finance Corp and we also know that later on in 2013 you returned about 620 million US Dollars. My learned friend put to you that Tanore Finance Corp is an entity owned by Jho Low. You said you were not or you couldn't confirm. Then why is it at that time you, at that time in 2013 you were of the belief that Tanore Finance Corp is a party connected to the Royal family?
>
> J: I believe because that was based on the donation letters. And my instructions to the bank was to return the money and returned the money where it came from. So, I assumed all along that Tanore Finance is part of the outfit of the Saudis.
>
> ...
>
> S: But what does the letter actually say with regards to how the monies were supposed to come in?
>
> J: It did say it is directly from my personal bank account or through my instructed company bank account such as Tanore Finance Corporation.

[2333]Further, the defence argued that the accused's reliance on the indication by Jho Lowthat the USD620m was to be returned to Tanore Finance Corp was

in light of the accused's belief on the dealings Jho Low had with, inter alia, Prince Turki. The following was recorded in the notes of proceedings on 23 January 2020 — DW1:

> S: Sir, I accept that. I accept that. But now I am saying because it is such a large money, on hindsight wouldn't it be more prudent?
>
> J: No, because he was nominated by the Royal family.
>
> S: What do you mean sir he's nomintated by the Royal family? The King had you both in a room and introduced you, this is my nominee is it?
>
> J: No, he was dealing with Prince Turki and members of the Royal family.
>
> S: How do you know that personally?
>
> J: Because he has been in touch with Prince Turki, I know that.
>
> S: No, sir how do you personally know that as a fact? You don't know that as a fact sir?
>
> J: No, I know that as a fact.
>
> S: Ok. So despite that you don't think it is prudent to have checked with ... it wouldn't be prudent?
>
> J: No because he was being chosen as a conduit.

[2334]The explanation of the accused went in circle. The issue is whether the return of the alleged donations was made to the person whom the accused claimed he thought was the donor, namely King Abdullah. He did not check with anyone, let alone the Saudi monarch personally. He was content on relying on Jho Low, and whatever impressions he had in the ability of Jho Low. The accused appeared to appreciate that Tanore Finance Corp was associated with Prince Turki, one of King Abdullah's princes. This is thus another basis of linking Jho Low's information to King Abdullah. But the defence did not emphasise much on the involvement of Prince Turki despite that possibly being an inference.

[2335]In my view this is because the accused did not want it to be made all too clear to the detriment of his defence that the factor of Prince Turki (and thus Tanore Finance Corp) was more because of the close business relationship between Jho Low and Prince Turki, and not due to any indication of nomination by King Abdullah. This would constitute yet another consideration that would deny the already much weakened defence of the belief of the accusedthat King Abdullah was the donor of the large foreign remittances which were credited into his Account 694.

[2336]It is a beguiling tale. The Saudi monarch expressed support favouring the accused as the Prime Minister of Malaysia in January 2010. Jho Low later

said King Abdullah wanted to make personal donation to the accused. But even at that stage in the middle of 2010 King Abdullah no longer featured in the donation narrative. By then the accused conveniently regarded Jho Low as a conduit for the Arab donation and even as representing the Arab Royalty. This gave the accused the *carte blanche* excuse of dealing only with Jho Low on matters concerning the alleged donation from King Abdullah, instead of engaging directly with King Abdullah or any other representatives identified by the monarch. Yet at the same time Jho Low was confirmed by the accused in his testimony as one of the three who were personally tasked by the accused to manage the personal accounts of the accused to ensure sufficiency of funds to enable cheques be written by the accused. Funds which were said to have come largely from King Abdullah.

[2337]The 'Arab letters', the huge sums of remittances, the return of USD620m in 2013, the further donation of GBP50m in 2014 (only one fifth received) among others, were all dealt with by the accused with Jho Low. No pre-donation verification, no confirmation of receipt, no expression of gratitude, no explanation for the return of the USD620m, no query on the subsequent donation in 2014 were made with King Abdullah whom the accused believed was the true donor. Even the little evidence of contact between the two leaders as documented in the two letters (P795 and P796) during the period 2011–2014 is absolutely and curiously bereft of any mention of the donation.

[2338]This dependence on Jho Low and the said letters are as such nothing but further evidence of the accused's continued perpetuation of his alleged belief of the late Saudi monarch as the source of the donations, when it has been shown that under the circumstances, accepting the words of Jho Low and the letters at face value without any inquiries, official or otherwise, despite the size of the foreign remittances is instead very strongly corroborative of the absence of a genuine belief held by the accused that the funds came from King Abdullah.

The closing of Account 694, the transfer of RM162m into Account 880 and fresh donation in 2014

[2339]Despite the return of the bulk of the unutilised donations in 2013, the accused testified that having discussed the matter with Datuk Azlin, the accused caused the Account 694 Account to be closed and three new accounts to be opened in August 2013. These are Account 880, Account 906 and Account 898, which more directly relate to the charges against the accused. The accused said the recommendation for the opening of the new accounts by his principal private secretary was seen as a better way of managing the accounts. The accused testified without elaboration that several other parties were expected to contribute towards further political and social CSR programmes.

[2340]At the same time, RM162m from Account 694 Account, being the balance of the 2013 funds was transferred to Account 880. The accused was also given cheque books for these accounts. The testimony of the accused is that because the initial funds were from the Account 694, the accused continued to utilise the funds in these new accounts mainly towards what he described as political, social and charitable causes as part of his personal CSR activities.

[2341]Then came a significant development. Sometime in 2014, the accused said he was told that further donations were being made through information relayed by Jho Low to Datuk Azlin. This concerns the letter of donation in D604. This letter was signed by the same person as the earlier three letters, as I have dealt with earlier. This latest letter was also given to Datuk Azlin and shown to the accused. The defence says that the management and monitoring of the new accounts through Datuk Azlin was the same as had been in place since 2011. Thus, just like previously, the accused would periodically be informed of remittances without specific details and would on an ad hoc basis enquire with Datuk Azlin on sufficiency of funds prior to issuing cheques, especially those of substantial value.

[2342]The defence therefore contended that the general sense of the funds was based on the same circumstances that appeared to be prevailing since 2011 and ultimately fortified by the fact that cheques issued were all cleared.

[2343]The defence added that at the same time the accused also understood that just like the earlier donations, the letter in D604 and the remittances were all being duly reported to the bank, BNM and the Governor. Similarly,the utilisation of the funds by the accused were largely towards what was described as CSR purposes like had been the case with the previous donations.

[2344]As such the defence submitted that again, the accused's belief that the funds in the new Account 880 were from further Arab donations in 2014 is justifiable in light of the prevailing circumstances since 2011 which appeared to be continuing.

[2345]In my assessment, there is nothing in this submission that advances the case of the accused. I have already found that the prevailing circumstances since 2011 claimed to have been relied on by the accused to justify the purported belief that the foreign remittances came from King Abdullah afforded him with no valid basis to hold such a belief.

[2346]Indeed, if the accused had truly held that belief earlier (which was not the case), by the time he was told about further donations in 2014, by virtue of information supplied by Jho Low again, the accused must have been alerted, because of the different circumstances, to seek confirmation of the actual

position of the status of the said imminent foreign remittances said to be further donations, from whom the accused claimed he thought the source was. Namely, King Abdullah himself. This, as has been said, was never done. Not in 2010 when first told, not later in 2014.

[2347]I say the circumstances in 2014 were different, and disagree with the contention of the defence that the prevailing circumstances since 2011 were continuing. This is because the accused had already in 2013 returned a bulk of the foreign remittances credited into his Account 694. For the reasons he stated, including to avoid any political controversy and that there was no further requirement for the excess as well as he could always ask for further financial assistance in the future.

[2348]There is however no evidence that the accused made any such request for the remittances in 2014. It appeared that the funds came out of the blue, unsolicited despite having been returned to the donor less than a year before. The accused also had the remainder RM162m which was transferred from Account 694 upon its closure in conjunction with the return of the USD620m in 2013 to the new Account 880.

[2349]I have already found that the four letters (D601–D604) could not be shown to be authentic. Further, for the fourth tranche of remittances in 2014, the MT103 remittance forms/SWIFT forms (D586(1)–(12)) were produced by the defence to show the origins of certain funds entering the accused's personal accounts that were attributed to the fourth donation letter in the sum of Great Britain Pounds ('GBP') £50m (D604).

[2350]It is worthy of emphasis that there are additionally at least four deficiencies with the remittances premised on this fourth letter (D604). First, the exhibits show that the last two batches of monies deposited into the accused's account on 5 December 2014 (D586(9)–(10)) and 10 December 2014 (D586(11)–(12)) were for the purpose of 'loan' and 'loan agreement' respectively. Hence, as the prosecution highlighted, the question arises as to whether these monies deposited into the accused's account was for a loan or a donation remains a mystery at the close of the defence case.

[2351]The second problem is this. Since the fourth donation letter (D604) states that a total of £50m would be sent as donations, the accused finally agreed when cross-examined that he was 'short-changed' by almost £40m. This is because only about £10m was 'donated' to him through the six transactions from Black Rock Commodities/Vista Equity (D586(1)–(12)) remitted into his Account 880. Thus in the notes of proceedings on 23 January 2020 — DW1:

S: And since you Azlin may have informed you of this credit. You knew that you've been short-changed, instead of 50 million there's only 10 million paid to you at that time?

J: I can't recall but most, it could. I could possibly have known.

S: Otherwise you would have been writing cheques for another 200 million you know? Correct or not? Logically? Correct sir? If you had not known you would be writing cheques for another 200 million.

J: But Azlin always advised me on how much I could spend. I could write.

S: I know Azlin advised. I'm just saying if you didn't know then you would have gone on you know, right? And the last two documents. Documents being stated as loans the total would be 995 Pounds and 1,264,462 Pounds. 2,259,462 approximately Pounds, which is equivalent to, we know the exchange here times 5.3 just approximately, 12 million dollars. So did you at any stage repay this loan of about 12 million to the Royal family sir?

J: I was never aware it was a loan.

S: Yes, you were never aware it was a loan.

J: No.

S: I'm putting it to you sir, this whole loan is all the fact that you got a donation is bogus. That is why all these discrepancies in the manner in which the funds find themselves into your account.

J: I disagree.

S: Did you sir, you were kind enough to return part of the funds you received from 6.6 you returned 6.2 USD billion, with the hope when you needed they would reciprocrate. So when this money was short changed did you ever inquire from Jho Low why there was 40 million short changed?

J: No, I was a recipient, I didn't want to enquire about it.

S: You didn't want to enquire about it. If it is a genuine loan, you agree you will have to pay back sir?

J: Yes, but I was never aware it was a loan.

S: No, I am saying if it is a loan you have to pay back. That's all I'm asking.

J: If it is a loan, yes.

[**2352**]Thus the third shortcoming with the alleged donations in 2014 is that despite being 'short changed' for almost £40m, the accused did not pursue the matter. After all it would seem that the fact that the monies needed for his overdrawn account arrived when it was precisely required demonstrates that this is an orchestrated credit of funds into the accused's account. The fact that he was 'short-changed' did not trouble the accused as long as the funds needed actually arrived when it was required.

[2353]Other than the difficulty of comprehending why the Saudi monarch would send the fourth tranche of Arab donation monies pursuant to the letter in D604 after the accused had returned the unused funds to the King in 2013 without the Saudi monarch demanding for the same and without any explanation made to the King by the accused, which I have already questioned, why then would the King subsequently in 2014 promise a donation of £50m and proceed to instead remit only £10m. Again, conveniently self-serving, the accused never checked with King Abdullah, whom the accused claimed to believe was the donor.

[2354]Fourthly, to further demonstrate that the accused did not request King Abdullah for this £50m, the fact that he attributed the arrival of £50m to Jho Low is borne out by the timing of the arrival of the donation as it seemed to have arrived just in time to help regularise the accused's personal accounts. And it needs no reminding that Jho Low was admitted by the accused to have been the one tasked to ensure sufficiency of funds in his personal accounts.

[2355]It should have been pretty obvious to the accused by then (if he had not already known) that Jho Low must have arranged for the fourth tranche to be remitted because Jho Low needed to replenish the personal accounts of the accused. In fact, as stated earlier, one of the transactions in the fourth tranche was the sum of only slightly above £2,000. It beggars belief that the accused could claim that he still at that late stage genuinely thought that the fourth tranche pursuant to the fourth letter (D604) was also from King Abdullah.

Jho Low's perceived authority from the Arab Royalty and role as conduit for donations

[2356]I have also dealt with the substance of this assertion. In this specific context, just like for the foreign remittances which earlier in 2011, 2012 and 2013 flowed into Account 694 of the accused, the defence essentially repeats the argument that the accused's belief that further Arab donations were being remitted in 2014 was based on information from Jho Low and the provision of the letter in D604 to Datuk Azlin and AmBank for reporting to BNM and the Governor.

[2357]The mere reporting to BNM is only a convenient excuse. As I have stated earlier, if BNM had told the accused, who then held the positions of the Prime Minister and the Finance Minister of the country, that they found the remittances suspicious, the accused could have pleaded ignorance, and blamed Jho Low instead. If BNM did not, like what actually transpired, the accused would continue using that defence of belief of the promise of personal donation made by the late Saudi monarch as a convenient excuse.

[2358]In any event, whilst BNM might not have alerted the accused about any concerns of suspicious transactions arising from the foreign remittances, actions had subsequently been taken by the Central Bank against AmBank. Ahmad Farhan Sharifuddin (PW4) an investigating officer of BNM testified that a financial penalty was imposed against Ambank for its failure to report suspicious transactions in the personal accounts of the accused. It is after all within the remit of MACC under the MACC Act and AMLATFPUAA to investigate the offences allegedly committed by the accused that had finally be framed in the instant seven criminal charges.

[2359]Regardless of Jho Low's influence with the Arab Royalty, his role as a conduit to facilitate the foreign remittances and the accused's own confidence in him based on what he had accomplished, I have found, among the many reasons that have been stated more than once, that the failure of the accused to ensure official confirmation of the then intended donations in 2011 from King Abdullah shows that his belief that the donations would be gifted by King Abdullah to have been most improbable. This is even more so for the remittances in 2014, given the fact that USD620m from the earlier alleged donations had the year before in 2013 been returned to sender, in circumstances that continued not to involve King Abdullah at all, whom the accused claimed to have been the actual donor.

[2360]As such, any argument about past circumstances in terms of remittances arrangement, involvement of Jho Low and Datuk Azlin, the letters in D601–D604 as supporting documents and the reporting to AmBank and BNM does not assist the defence of the accused. For instance, the submission that the remittances for each year were substantial and correlated to the amounts reflected in the supporting letters in D601–D604 is spurious when all the circumstances and the evidence of the case are carefully scrutinised.

[2361]Obviously, the remittances received and the amounts stated in the 'Arab letters' would correlate if the true source and the writer of the letters collaborated. Here the accused never bothered to verify the source when he could have easily done so, and the authenticity of the letters at the same time, as discussed, very serious doubted. The accused says in his mind the mode of operation of the new accounts (especially Accounts 880 and 906 which received the RM42m in late 2014 and early 2015) was no different from the operations of Account 694. Notably for Account 694, the funds were substantial.

[2362]That the accused did not check the actual balances is, as shown earlier, already lacking in believability, but in any event to say he continued the same

approach of not checking the actual balances in the new accounts despite the sizeable sums of monies in the hundreds of millions in RM is again incredible and self-serving at the same time.

[2363]It is therefore simply untrue and plainly contrary to the weight of evidence that there was nothing to distinguish events in 2014 from previous years in that throughout 2011–2013 hundreds of cheques were issued by the accused from Account 694 without any issue. And that like circumstances appeared to be repeated in 2014–2015 with the accused's cheques not being dishonoured, such that the accused's bona fide belief could therefore be reasonably be said to be sustained throughout. The foundation of this alleged belief, from the time the accused said he was told by Jho Low in late 2010 that King Abdullah wished to make personal donations to the accused is already devoid of credible and substantive worth, for the reasons that I have repeated a number of times already.

Whether the alleged Arab donations had been fully utilised before the remittance of the SRC's RM42m

[2364]Based on the statements of accounts of the three personal accounts of the accused, the remittances from the first three 'Arab letters' including the balance RM162m retained in Account 880 (after the return of USD620m in 2013) had been fully utilised in 2014 before the arrival of the RM42m from SRC in late December 2014.

[2365]However, the defence submitted that the same cannot be said of the remittances of the fourth tranche of the alleged Arab donation pursuant to the fourth 'Arab letter' (D604) in 2014.

[2366]It was the prosecution's submission that the said Arab donations made in 2014 of RM49m by way of six inward foreign remittances in GBP to Account 880 had been completely utilised prior to the subject RM42m being transferred into the Accounts 880 and 906. Because the accused continued to utilise these funds, he must have known that the RM42m was not therefore from the alleged donations.

[2367]The statements of accounts of the three accounts of the accused do not, I agree, show that the alleged Arab donations had actually been entirely extinguished before the remittance of RM42m into Accounts 880 and 906 subject to the instant charges.

[2368]I observe that out of the total remittances in 2014 of RM49m as documented in D586(1–12), some RM6.8m (D586(11–12)) was credited into Account 880 on 19 December 2014. And out of this RM6.8m, RM6m

was transferred to Account 906 on 26 December to regularise the negative position in that account of about RM142 thousand, resulting in a balance of over RM5.8m in that Account 906.

[2369]Whilst it is clear, as has been shown, that on the same day of 26 December 2014, RM32m was transferred from IPSB into Account 880 (RM27m) and Account 906 (RM5m), and the exact amount of RM27m and RM5m was subsequently respectively transferred to PBSB and PPC on 29 December 2014, it appears that the said balance of about RM5.8m in Account 906 and the balance of about RM800 thousand in Account 880 remained intact and was eventually only utilised in January 2015 towards further cheques presented.

[2370]The defence, as such, argued that as the accused's belief of the funds being from Arab Royalty donations was not based on any particular transaction or remittance but was in fact related to the funds in the accounts generally, these transactions caused the continued belief that there were substantial Arab donations in the account as depicted by the letter in D604 for the year 2014. In addition, it is asserted that apart from the RM49m remittances, there were numerous other inward remittances and deposits caused which resulted in the cheques issued being honoured.

[2371]This argument of the defence ignores the obvious. Which is that when the accused needed to pay RM32m to PBSB and PPC as evidenced in his own instructions to Am-Islamic Bank in P277 dated 24 December 2014, the accounts of the accused did not have that much funds to execute the instructions. That was why RM32m had to be transferred from SRC into the accounts of the accused via GMSB and IPSB, which happened on 26 December 2014.

[2372]The fact that Account 906 had close to RM6m which is not even a quarter of RM32mn is therefore inconsequential to the requirement as made explicit in the accused's instruction to transfer a total of RM32m to PBSB and PPC in P277. This therefore negates the argument of the defence that the accused did not have any actual knowledge of the RM42m transaction or have any reasonable suspicion to question the source of the funds in his accounts.

[2373]The other related argument of the defence is that the accused had reason to believe that when RM27m and RM5m was paid into Account 880 and Account 906 respectively on 26 December 2014, the accused believed that there were substantial Arab donation left in his accounts based on the fourth letter (D604). This is not borne out of the evidence, because the only sums that remained in Account 906 on 26 December 2014, as stated in the statement of accounts (P110) before the deposit of RM5m from PPC was that RM5.8m.

The sum that remained in Account 880 before the arrival of RM27m from PBSB was RM848,000. In other words, the accused had only RM6.6m in his accounts at the time when the RM42m arrived. And even this RM6.6m is not wholly the balance of the so-called Arab funds but includes the cash deposit from 19 June 2014–17 December 2014 which amounted to more than RM5m.

[2374]This state of affairs at the material time therefore translates to a position where the alleged Arab donation money remaining in the accused's bank accounts was plainly insufficient for the accused to assume that he was spending the alleged Arab donations. This means that when the RM27m and the RM5m being the subject matter of the CBT charges got credited in the accused's accounts, there was no valid reason for the accused to believe that he still had Arab donation monies to spend on. On the contrary, the accused must have had actual knowledge of the RM32m paid in December 2014 and the subsequent RM10m paid into his account in February 2015. The accused would most likely at the very least have had reasonable suspicion to question the excess of funds in his account as he had utilised more than the RM49m which purportedly came from the Arab Royalty. Such that he must have known that the funds remitted into his accounts were from other sources-specifically SRC.

Whether the accused had knowledge of the RM42m from SRC vis a vis actual funds available

[2375]In order to complete the analysis on this issue, I appreciate that the defence made much of the fact that towards the end of 2014, there were further remittances arising from the fourth Arab donation letter (D604), and that the accused believed that it was this funds that he spent on, and that he did not know it came from SRC. I have earlier analysed in great detail that this belief of continued Arab donation could not have been honestly held by the accused, and that it is fabricated.

[2376]Nevertheless, I will further address this defence case that between June 2014 and December 2014, the accused had received into his personal bank accounts the alleged fourth tranche of the Arab donation amounting to RM49m. As stated earlier, the accused did testify that this RM49m from Blackrock and Vista Equity pursuant to the fourth 'Arab donation' could have been informed to him by his principal private secretary, Datuk Azlin (who in turn got the information from Jho Low).

[2377]First, however, it should again be made clear that the RM162m from the earlier alleged Arab donations (which was not returned to the donor in 2013) which had been paid by the accused into the then newly-opened

Account 880 had been completely utilised. This sum no longer featured in the accounts of the accused in the period between June 2014 and December 2014. A

[2378]Back to the RM49m which did enter the account of the accused. Now, apart from this alleged Arab donation, the accused had also during the same period as a matter of fact received other funds of approximately RM87m into his account, which the accused claims he had no knowledge of. According to the defence, apart from the RM49m which he knew, the other RM87m comprised; first, the transfers from PBSB and PPC in July and September 2014 (RM32m); secondly, cash deposits (RM12.4m); thirdly, the December 2014 transaction from SRC (RM32m); and fourthly, the February 2015 transaction from SRC (RM10m). B C

[2379]The defence submitted that it is this RM87m that gave the accused the basis to believe that he still had sufficient funds from the alleged fourth Arab donation, on top of the RM49m. D

[2380]This is not a substantive argument. The accused only had RM49m of the alleged Arab funds at the material time. He even agreed that that was the sum credited into his account, as could have been notified to him by Datuk Azlin. It defies logic for the accused to say that whilst he kept writing cheques after checking with Datuk Azlin or with his 'sense' of the RM49m Arab donation sitting in his account, he also believed that the further sum of RM87m also came from Arab donation. This is especially telling since this balance of RM87m included the RM27m from PBSB, RM5m and PPC and RM42m from SRC, the aggregate of which is far in excess of the RM49m. E F

[2381]In other words, if the defence of the accused on the use of SRC's RM42m is that he thought this was from the alleged fourth Arab donation, evidence of his utilisation not only of the entire RM49m but also the whole of the other RM87m reveals the frailty of this defence. It is too preposterous for the accused, then the Prime Minister and Finance Minister of the country to claim having no knowledge of the funds of RM87m in excess of the alleged Arab donation of RM49m in his accounts yet had no qualms of spending on the entire RM136m (RM87m plus RM49m) during the same period. The only irresistible inference is one that finds that the accused had knowledge of this RM87m which includes the RM42m from SRC, being the subject matter of the charges against him. G H

Role of Jho Low – To deceive the accused? I

[2382]The accused claimed that Jho Low was well connected with the Saudi Royal family based on the reasons he had explained in his testimony and that he believed Jho Low was appointed and chosen by members of the Saudi Royal

family as their nominee. I have already discussed this and found that this purported belief is untrue and contrived.

[2383]Evidence has also shown especially from the accused's testimony that Jho Low dealt with AmBank with the knowledge of the accused and that his principal task was to ensure funds were available in the personal accounts of the accused. Further, although Nik Faisal was the mandate holder for the personal accounts of the accused, AmBank through Joanna Yu (PW54) dealt with Jho Low in the absence of Nik Faisal to ensure funds were speedily made available and thereafter Nik Faisal would follow up and make the internal transfers to ensure the cheques were honoured.

[2384]The defence then developed the contention that the conduct and efforts of Jho Low crediting funds into the accounts of the accused was done to trick the accused to believe that the accused actually had funds in his accounts. Significantly, this is premised on the assertion that Jho Low had during the same period engaged in financial irregularities involving the accounts of the accused vis a vis among others SRC such that the reason for his continued injection of funds into the accounts of the accused was to prevent the accused from discovering the actual situation and the various deceptions. This is also the testimony of the accused, which was however only given during re-examination.

[2385]This is a curious contention. It is for all intents and purposes saying that by crediting funds when needed in the personal bank accounts of the sitting Prime Minister of the country, Jho Low was deceiving the Prime Minister into believing that he had funds in his accounts when he did not. Is this capable of belief? After all, the accused himself testified that Jho Low, Datuk Azlin and Nik Faisal were tasked to ensure sufficient funds were available for the accused to issue cheques. Despite the testimony of the accused that he communicated with Jho Low only occasionally, this seems unreal given the pivotal role of Jho Low is ensuring sufficiency of funds in the accounts of the accused especially since Jho Low was identified by the accused as the conduit for the source of funds from the alleged Arab donations.

[2386]The evidence in the BBM conversations (P578) also shows contacts between the two including on account balances, as well as on problems faced by the accused on his use of his credit cards. DW8, another witness for the defence also confirmed that he knew from his close friend, the late Datuk Azlin, that Jho Low had a direct access to the accused. Jho Low was as such on evidence executing the task entrusted on him by the accused. The actions of Jho Low were done in full compliance with the task given to him and the requirements of the accused for very large amount of funds for him to spend on.

[2387]The crux of the matters is the accused himself admitted that Jho Low was tasked to ensure there were funds for his financial requirements at all times. Evidence shows that during the relevant years the accused had spent some hundreds of millions, the bulk of which was on what he described as CSR activities, which I have found to be for personal and political interests. That was why Jho Low was injecting monies into the bank accounts of the accused who was constantly writing out cheques out of these accounts.

[2388]One key aspect that remains clouded in a thick mist of obscurities is the accused's thinking as to the source of massive funding for his accounts when he tasked Jho Low and others to ensure availability of funds in his accounts. How exactly were the three supposed to source for extremely large sums of monies? This already weakens the credibility of the shaky defence of the accused, for it suggests that everyone including the accused knew all along of the actual source of the massive funding in his personal accounts during the years 2011–2014, and the defence is a convenient ex post facto afterthought.

[2389]If not for the Arab donation story, it would have been impossible for the accused to have spent in the manner recorded in his statements of accounts. And I have already demonstrated why this defence on the honest belief that the remittances came from King Abdullah is nothing but a contrived narrative at best.

[2390]Nevertheless, to take a best case scenario for the defence — which is that the whole shenanigan was a fraud perpetrated by Jho Low against the Prime Minister of the country (already a weak premise, to suggest that a serving Prime Minister who was also the Finance Minister of the country was capable of being duped by a trusted individual over a number of years, not to mention Jho Low would have to be supremely audacious to do so) — thus to assume that the Arab donation story was concocted by Jho Low to deceive the accused who then honestly believed the remittances as a result came from King Abdullah (which belief is in any event already shown to be patently contrived), Jho Low continued as shown by evidence to pump in funds and avoid cheques written by the accused from being rejected.

[2391]The reason advanced by the defence now is that this was done to prevent the accused from discovering the truth if the funds stopped being channelled into his accounts and the cheques get bounced. This explanation is a conjecture, not evidence. This was offered by the accused in re-examination when he could not satisfactorily respond to the same question when cross-examined. It is inconsistent with the totality of the evidence. Evidence which shows that Jho Low was tasked by the accused himself to ensure sufficiency of funds in the accounts of the accused to enable spending by the accused. Evidence which reveals Jho Low's many and various efforts in his

A interactions with Joanna Yu (PW54) to avoid the cheques issued by the accused being rejected by giving him time to effect transfers of funds into the relevant accounts of the accused. Evidence which demonstrates the many and various payments by cheques made by the accused out of his personal accounts made possible by the inward remittances.

B

[2392]The defence argued that the trend on cheque issuance shows that on some occasions Jho Low did not know in advance of the plans by the accused to issue cheques and his efforts to put in funds were largely reactionary to what had already been done by the accused (in issuing the cheques). The defence also C submitted that this corresponds with the accused's assertion that he did not check his account balances. I have earlier shown this was not at all the case in all situations. The theory that Jho Low did not know in advance of the plans of the accused is lacking in merit.

D

[2393]On the totality of the evidence the consistent narrative is that Jho Low (and Nik Faisal and Datuk Azlin) had been tasked to ensure sufficiency of funds in the accounts of the accused. That task is crystal clear. That was the direction and requirements of the accused who was the Prime Minister then. It E would be for Jho Low and the rest to ensure that the cheques never get dishonoured.

[2394]Jho Low did what the accused had asked him to do which was to ensure sufficiency of funds and which included to ensure that the cheques would never F under any circumstances be dishonoured. As Prime Minister the accused was comforted in the belief that his cheques would never be allowed to be dishonoured. He needed to make many payments and he only needed to know that he had tasked Jho Low to ensure sufficiency of monies in his personal accounts.

G

[2395]The issue of the accused making any enquiry into his accounts in the event any of his cheques did bounce does not arise because the accused knew that his cheques would never get dishonoured. Indeed even Joanna Yu (PW54) had provided her own money to help Jho Low fund the accounts of the accused H to avoid cheque rejection.

[2396]It is way too far-fetched and self-serving for the accused to claim that he was deceived and defrauded by Jho Low. Or how the defence described the accused as being a victim of a scam orchestrated by Jho Low. For evidence I plainly shows that Jho Low had performed the task required of him by the accused with unmatched distincition, by channelling the large sums of funds into the personal accounts of the accused, and the accused had benefitted by the ability of making payments in the amount of almost RM1 billion during the period. The accused, despite claims of being scammed, agreed that he did

not lose any money. Instead he benefitted immensely by the remittances of huge sums of monies into his accounts.

[2397]This is incontrovertible and not the least affected by the evidence of outward and inward transfers of funds of SRC which appear to have been orchestrated by Jho Low (other than the RM42m) for his own purposes. The irresistible inference is that Jho Low was closely assisting the accused to secure funding for the latter, and the accused must have known about the sources of the funds, including SRC in respect of the transfers made into his Accounts 880 and 906 on 26 December 2014 and 10 February 2015 as specified in the charges against him.

[2398]The contention that Jho Low had engaged in other questionable transactions involving SRC is irrelevant to the charges, even if there is no evidence of the complicity of the accused in these other transactions. The prosecution too did not seek to adduce the same because they are removed from the seven charges against the accused. The accused is now the one on trial, not Jho Low.

[2399]Furthermore, even if it is accepted that Jho Low was operating a big deception, any discovery would have also exposed not only Jho Low but also the accused to investigations on the use of SRC funds. This also explains why no action was taken by the accused especially vis a vis Jho Low when told by PW37 and PW49 in July 2015 of the transfers of SRC funds into his personal accounts. The accused only raised this version of the great deception led by Jho Low at the earliest after being charged in July 2018. It is also not mentioned in his defence statement.

[2400]I should add another point. It is public knowledge that the questions concerning 1MDB, including its operations, level of debts and investments had entered public sphere, such as even in the Parliament as early as in 2010. Queries were subsequently also made, often directed to the government and the Prime Minister himself, on the exact role and involvement of Jho Low. Despite all these, evidence now shows, especially from the BBM records (P578) and the testimony of Joanna Yu (PW54) that Jho Low was actively involved in the management of the accused's personal bank accounts, including in the very transactions concerning the RM42m in December 2014 and February 2015 now stated in the CBT and money laundering charges. For the accused to now allege that Jho Low had deceived him rings hollow, at best.

Whether identity of transferors for the 2011–2013 transactions corroborates genuine Arab donations

[2401]The defence also submitted on the identities of the transferring parties as reflected in the MT forms for these transactions which were part of the bank's records. In summary the following were transacting parties:

Year	MT-Exhibit	Transferor	Total Amount (Approximate)
2011	D788(1)–(5)	Prince Faisal bin Turki	USD20m
		Ministry of Finance, Riyadh	USD79.99m
2012	D798(1)–(9)	Prince Faisal bin Turki	USD99.99m
		Blackstone Asia Real Estate Partner	USD169.99m
2013	D790(1)–(2)	Tanore Finance Corp	USD681m

[2402]The point being advanced by the defence is that the identity of the transferors of the 2011–2013 remittances being as aforesaid corroborates the basis for inferring the accused's belief on the genuineness of the Arab Royalty donations because the legitimacy of the remittances being from the Arab Royalty as per King Abdullah's assurances is reflected by the transferring parties including Prince Faisal and the Ministry of Finance, Riyadh. In particular, the letters in D602 and D603 also specify the names of the same transferring parties which infers genuineness.

[2403]This would have in addition in due course also been noted by AmBank and BNM and no red flags were raised as a result. DW2, a subordinate of PW54 confirmed that her understanding from PW54 was that PW54 had duly informed PW50 and later Mr Ashok Ramamurthy (Group CEO of AmBank) and the compliance department of AmBank all of the incoming funds and of the corresponding gift letters. PW54 also confirmed that she was made to understand that PW50 reported the same to BNM and the Governor. The completed Form R would have all been submitted to BNM. PW50 himself confirmed that sometime in 2013 or 2014, he and Ashok Ramamurthy met with BNM Governor and briefed her about the accounts of the accused.

[2404]At the same time, the transferees as aforesaid further strengthens the accused's belief of the role and authority of Jho Low in the matter as the remittances were indicated by Jho Low and the D601–D603 letters were produced as evidence thereof by Jho Low as well.

[2405]The identity of Tanore Finance Corp being the party remitting the 2013 funds also corroborates the accused's belief based on D603 that Tanore Finance Corp was a company related to the Arab Royalty and Jho Low's confirmation that Tanore Finance Corp was the party to receive the return by the accused of the USD620m unutilised donations is thus well-corroborated.

[2406]I cannot accept this argument. The belief of the accused, as claimed, is that the foreign remittances came from King Abdullah. The list of transferors does not include the name of the late Saudi monarch. As I have found earlier, it is most incredible, among other reasons, for the accused considering his position as the leader of an independent democratic country not to have ensured proper verification of the claim by Jho Low of the late Saudi monarch's wish to extend financial support in the form of personal donations to the accused. It was conduct unbecoming on the part of the accused — professionally and officially, if he had truly believed that King Abdullah would make the donations.

[2407]Furthermore, as I have stated earlier, the transferors include entities which are not based in KSA, rendering their relationship with King Abdullah even less apparent.

[2408]Nevertheless, the important point is that evidence shows that based on the defence's narrative, the knowledge of the accused on the remittances from the alleged Arab Royalty source was limited to the information disclosed in the said four letters (D601–D604). I have stated that only the second and third letters identified the transferors, namely Blackstone Asia Real Estate Partners Ltd and Tanore Finance Corp, respectively. The first letter (D601) for the remittances in 2011 did not mention the party that would make the transfer. The remittance documents (D788) show that funds remitted in 2011 in fact came from Prince Faisal bin Turki and the Ministry of Finance, Riyadh. Uma Devi (PW21) of AmBank JRC branch and the investigating officer (PW57) too confirmed this information from these documents.

[2409]However, it is crucial to observe that this point does not advance the defence of the accused's honest belief in Arab donation because the accused himself had no knowledge of the identities of the transferors for the remittances other than what was stated in the four letters. None of the letters mentions the Ministry of Finance, Riyadh or Prince Faisal. The defence cannot therefore argue that the fact that the funds in 2011 came from the Ministry of Finance, Riyadh or Prince Faisal supports the accused's claim of labouring under the honest belief that the funds came from King Abdullah because the accused had no such knowledge (on the actual transferors) to form that belief to start with. This argument therefore reeks of an afterthought.

[2410]In addition, even the fact that the funds are recorded on the remittance documents to have been transferred by the Ministry of Finance, Riyadh and Prince Faisal does not in any manner confirm that the funds actually came from King Abdullah, including whether the funds were supposed to be from the Government of the KSA or personal in nature. Moreover, the even more

substantial remittances in 2012 and 2013 came from other entities which appeared to have nothing to do with KSA.

[2411]No less importantly, I must reiterate that this reference to events in 2011–2013 is made only because of the accused's contention that his honest belief on the Arab Royalty donation story is primarily premised on the fact of the remittances made in those prior years. The defence argued that the circumstances which prevailed then continued in 2014 and 2015, the period relevant to the charges against the accused, which justified the accused's holding the said belief. I have earlier found that by the time of the fourth tranche of remittances in 2014 related to the fourth Arab letter (D604), the circumstances had so drastically changed such that reliance on the remittances in prior years (in itself in my view unjustified and untrue) is no longer tenable.

[2412]If on the other hand, as the accused never had that believe, and knew from the inception that the funds would come from other sources as may be arranged by Jho Low, which he must have fully sanctioned, including from SRC which entity the accused controlled, there was plainly no reason for the accused to conduct any enquiries on the truth of Jho Low's assertion. At the same time, any criminal irregularities committed by Jho Low and others in the conduct of the accused's accounts must be insulated from the accused, who was after all the Prime Minister at the time.

[2413]I have shown that the accused never had that belief from day 1. He did not verify whether the personal donations was true nor demonstrated any interest on the terms of the financial support. This conveniently allows him to adopt the strategy of feigning ignorance of the balances in his own accounts despite the entry of hundreds of millions in USD, and leaving everything to be managed by Jho Low, Datuk Azlin and Nik Faisal. The accused was only concerned with the issuance of cheques made possible by the remittances in the first place, after being updated by Datuk Azlin if it was clear for him to issue the cheques or based on the accused's own 'sense' of the availability of funds in his own accounts.

[2414]In the event that action were to be taken against the accused personally which would have at the time been extremely unlikely if not virtually impossible given his position of power, blame could readily be wholly apportioned to Jho Low, and possibly others who managed his account for having conducted unlawful transactions involving his personal accounts.

[2415]As fate now has it, the three identified by the accused as having been involved in that regard, are all unavailable as witnesses in this trial. The

authorities have tried to apprehend Jho Low and Nik Faisal but they are believed to be in hiding in foreign countries and Datuk Azlin has passed away in a helicopter crash in 2015.

[2416]I again emphasise that the comfort that the accused repeatedly highlighted concerning the relevant documentation having all been reported to AmBank and BNM must also be seen in the same light. If BNM had raised any concerns with him he could have easily denied knowledge and blamed Jho Low instead as the accused's defence which is what essentially presently advanced by the defence.

[2417]Given that finding, it is only to be expected that the accused would perpetuate the narrative of feigned ignorance. If he had acted responsibly in verifying the late King Abdullah's true intentions (which he did not because he knew it was a fabrication, which he condoned), he would have known that the identities of the transferors were a total falsehood. In order to lend some semblance of credibility to his belief of donation from King Abdullah, the identities of the transferors were most likely have thus been deliberately manufactured to such effect, as well as to be consistent with the letters in D601–D604 which was again conveniently said to have been relied on by the accused, and which authenticity,as has been shown, cannot be proved.

Summary of findings on the defence of belief of funds from King Abdullah

[2418]On the totality of the evidence I do not therefore accept that the circumstances and the events I have earlier discussed in detailed fashion support the inference that the accused was under the honest knowledge and reasonable belief that the funds in his accounts in 2014 and 2015 pertinent to the charges against him were further Arab donations as reflected in the 'Arab letter' dated 1 June 2014 (D604).

[2419]I have earlier analysed the circumstances and events from January 2010 up to 2015 relating to the pledge of support, the manner in which the remittances were made, the intimations from Jho Low and the production of supporting letters which the accused simply accepted without official or any verification. I have held that events which seemed to fortify the perception of Jho Low's influence and authority vis a vis the Arab Royalty and role as a conduit to facilitate the donations from 2011–2014 did not afford sufficient justification and valid foundation for the accused to have totally relied on the words of Jho Low, and thus abandoned any form of confirmatory inquiries on the identity of the donor, and the accompanying terms and conditions, if any.

[2420]This is especially since the remittances would flow from a foreign country, where there could be conditions or expectations on the part of the

donor requiring conduct or decision by the accused as the Prime Minister of Malaysia which would potentially not be in the national interest or consistent with the defence and security policy of the country.

[2421]I have also found that the continuous reporting of the remittances and the supporting letters from 2011–2014 to AmBank, BNM and its Governor could not have further fortified the belief on the genuineness of the donations. This was merely the perpetuation of a strategy of feigned ignorance that the accused, then the Prime Minister and Finance Minister of the country, presented to the authorities. Which was to blame Jho Low if caught out, and to continue accepting and utilising the foreign remittances, if not.

[2422]Similarly I have found that the contention that the circumstances were as had prevailed since 2011 and that there was no occurrence which could have reasonably raised any cause to suspect that the transactions in 2014 were different from the previous remittances in 2011–2013 to be fallacious. As is the submission that there was no cause to query the source of the funds as the circumstances as a whole led to the belief that the funds in the accounts in 2014 were a further instalment of similar remittances made in 2011, 2012 and 2013.

[2423]As I have discussed, during the said period, there was never any evidence of any acknowledgment made by the accused to King Abdullah or anyone else for that matter thanking the Saudi monarch for the more than generous donations claimed by the accused to have been made by King Abdullah. Further, the 2014 remittances were different from the earlier ones because the accused had in 2013 already returned the bulk of the unutilised sum of USD620m to the donor, in a process which also saw the absence of evidence of any communication between the accused and King Abdullah, the supposed donor, for the return of the funds. Yet, despite the return of USD620m in 2013, the accused inexplicably accepted further remittances in 2014, wholly unsolicited.

[2424]I have also shown that the purported belief which was said to have been caused to be maintained by, inter alia, ad hoc confirmations by his late principal private secretary prior to issuances of big cheques and that all cheques issued from 2014–2015 being honoured is no support to the assertion that the remittances came from King Abdullah. The accused all too conveniently claimed never to have checked the balances of his own personal bank accounts, instead focussing more on the cheques issuance of funds from the remittances into his accounts, and assuming the source of the funds were the remittances from King Abdullah. This is an extremely unlikely scenario, where the spending on the remittances were made with virtually zero accountability. No inquiries made on account balances and no evidence of documentation

recorded for the utilisation of the remittances. I concluded that the accused must have known the balances and the sources of funds. A

[2425]The argument on the reliance by the accused on other events which transpired including the purported verification of the D601–D604 letters from Prince Saud and confirmation of entities such as Tanore Finance Corp and Blackstone Asia Realty Partners being nominees of the Arab Royalty too is misconceived. The accused even testified he did not in fact know the writer of the letters in D601, D602, D603 and D604 who claimed to be Prince Saud. Yet all the letters, addressed to the accused's private residence in Kuala Lumpur stated that the gift was made 'in view of the friendship that we have developed over the years' without any allusion to any attempt to claim that the letters were signed by the said Prince Saud on behalf of KSA or King Abdullah. B C

[2426]The accused placed great reliance on these letters in his defence of belief that the funds came from King Abdullah. As I have stated this is so despite the absence of any evidence of any attempt by the accused to find out who Prince Saud is, let alone to inquire if the letters were genuine. Since reliance on these letters is fallacious, the accused's purported belief that the transferors such as Tanore Finance Corporation and Blackstone Asia Real Estate Partners Ltd were representing King Abdullah because they were referred to in the letters in D602 and D603 cannot therefore be sustained. D E

[2427]For the same reasons I have found that there is no basis to conclude that the conduct of the accused throughout the period was consistent with the belief that funds in the accounts from 2011–2015 were all from donations from Arab Royalty, specifically King Abdullah. His requests that adherence must be made to all rules and regulations when Account 694 was opened, and his understanding of complete reporting was also part of an elaborate strategy of feigned ignorance. F G

[2428]The utilisation of about 99% of RM1 billion from the remittances for what the accused categorised as CSR initiatives and for the 13th General Elections from the 2011–2013 remittances was largely for personal political benefit since much of the spending was channelled to political organisations led by the accused. Whilst all four letters stated that it was for the accused to decide how to utilise the funds at his discretion, the thrust of the letters was that the actions of the accused would 'continue to promote Islam, so it continues to flourish' and the gifts was the writer's 'way of contributing to the development of Islam to the world'. The continued utilisation of funds primarily for 'CSR initiatives' throughout 2014–2015 merely represented a weak attempt to replicate the same flawed narrative. H I

[2429]It is apposite in this context that I refer to the case of *Ivey v Genting*

Casinos (UK) Ltd (trading as Crockfords Club) [2017] 3 WLR 1212 which is mentioned by both prosecution and defence relevant to the issue of the inference of knowledge and belief whereby the UK Supreme Court importantly held as follows:

> [74] These several considerations provide convincing grounds for holding that the second leg of the test propounded in *R v Ghosh* [1982] QB 1053 does not correctly represent the law and that directions based upon it ought no longer to be given. The test of dishonesty is as set out by Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 and by Lord Hoffmann in *Barlow Clowes International Ltd v Eurotrust International Ltd* [2006] 1 WLR 1476, para 10: see para 62 above. *When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.* (Emphasis added.)

[2430]As such, when determining the question of dishonesty, a two-stage process must be performed. First is the subjective test to find out whether the accused truly held the alleged belief. The reasonableness of the belief is also relevant to whether he actually held the belief. The second is an objective test, where if the belief is established to have been held by the accused, the answer to the question whether his conduct was honest or otherwise is to be measured against the conduct of ordinary decent people.

[2431]Further clarification is provided in the decision of the English Court of Appeal in the case of *R v Barton and another* [2020] EWCA Crim 575 where it was held that following *Ivey v Genting Casinos (UK) Ltd* which is preferred to the test of the Court of Appeal Criminal Division in *Regina v Ghosh* [1982] QB 1053, where in the application of the objective test at the second stage of the evaluation, considerations to be taken into account include the experience and intelligence of the accused. Lord Burnett LCJ stated thus:

> 105. *In the result, the test for dishonesty in all criminal cases is that established in Ivey.*
>
> 106. We would not wish it to be thought that we are following *Ivey* reluctantly. The concerns about *Ghosh* have resonated through academic debate for decades. Lord Hughes's reasoning is compelling.
>
> 107. *That said, we wish to endorse the respondent's submission that the test of dishonesty formulated in Ivey remains a test of the defendant's state of mind — his or her knowledge or belief — to which the standards of ordinary decent people are applied. This results in dishonesty being assessed by reference to society's standards rather than the defendant's understanding of those standards.* Lord Nicholls of Birkenhead, echoing the approach

suggested by Lord Hoffmann in *Barlow Clowes* (see [91] above) observed in *Royal Brunei Airlines* at p 389:

> [...] acting dishonestly, or with a lack of probity, which is synonymous, means simply not acting as an honest person would in the circumstances. This is an objective standard. At first sight this may seem surprising. Honesty has a connotation of subjectivity, as distinct from the objectivity of negligence. Honesty, indeed, does have a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated. [...] However, these subjective characteristics of honesty do not mean that individuals are free to set their own standard of honesty in particular circumstances. The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale, with higher or lower values accordingly to the moral standards of each individual. If a person knowingly appropriates another's property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour.

And at p 391:

> ... when called upon to decide whether a person was acting honestly a court will look at all the circumstances known to the third party at the time. The court will also have regard to personal attributes of the third party, such as his experience and intelligence, and the reason why he acted as he did.

108. This approach, which was the approach of the Supreme Court in *Ivey*, makes clear that when Lord Hughes talked in [74] of the 'actual state of mind as to knowledge or belief *as to the facts*' (our emphasis) he was referring to all the circumstances known to the accused and not limiting consideration to past facts. *All matters that lead an accused to act as he or she did will form part of the subjective mental state, thereby forming a part of the fact-finding exercise before applying the objective standard. That will include consideration, where relevant, of the experience and intelligence of an accused.* In an example much used in debate on this issue, the visitor to London who fails to pay for a bus journey believing it to be free (as it is, for example, in Luxembourg) would be no more dishonest that the diner or shopper who genuinely forgets to pay before leaving a restaurant or shop. The Magistrates or jury in such cases would first establish the facts and then apply an objective standard of dishonesty to those facts, with those facts being judged by reference to the usual burden and standard of proof. (Emphasis added.)

[2432]In yet another application of *Ivey v Genting Casinos (UK) Ltd*, the English Court of Appeal in *Group Seven Ltd (a company incorporated under the laws of Malta) and another company v Notable Services LLP and another* [2019] EWCA Civ 614 held that the fact that suspicion is aroused is a matter to be taken into account at the objective second stage test as propounded in *Ivey v Genting Casinos (UK) Ltd*. The Court of Appeal made the following observations:

> 56. After a full review of the criminal case law since *Ghosh*, Lord Hughes then stated his conclusions at [74] and [75]. He said that the second leg of the *Ghosh* test does

not correctly represent the law, and that the test of dishonesty is as set out by Lord Nicholls in *Tan* and by Lord Hoffmann in *Barlow Clowes* at [10]. Lord Hughes continued: 'When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.' Accordingly, as Lord Hughes explained at [75], if (contrary to his previous conclusion) the concept of cheating at gambling included an additional legal element of dishonesty, it would be satisfied by the application of the above test. It may be that Mr Ivey was truthful when he said that he did not regard his conduct as cheating, but that could not amount to a finding that his behaviour was honest. Whatever his own views on the question may have been, Mr Ivey's conduct constituted cheating, and it was also dishonest.

57. In the light of *Ivey*, it must in our view now be treated as settled law that the touchstone of accessory liability for breach of trust or fiduciary duty is indeed dishonesty, as Lord Nicholls so clearly explained in *Tan*, and that there is no room in the application of that test for the now discredited subjective second limb of the *Ghosh* test. That is not to say, of course, that the subjective knowledge and state of mind of the defendant are unimportant. *On the contrary, the defendant's actual state of knowledge and belief as to relevant facts forms a crucial part of the first stage of the test of dishonesty set out in Tan. But once the relevant facts have been ascertained, including the defendant's state of knowledge or belief as to the facts, the standard of appraisal which must then be applied to those facts is a purely objective one. The court has to ask itself what is, essentially a jury question, namely whether the defendant's conduct was honest or dishonest according to the standards of ordinary decent people*.

...

61. Where the conditions for imputation of blind-eye knowledge are satisfied, a person is treated for the purposes of establishing liability for dishonest assistance as if he had actual knowledge of the relevant facts. We do not think it follows from this, however, that suspicions which fall short of constituting blind-eye knowledge are wholly irrelevant to the question whether an alleged accessory has acted dishonestly. *The first stage of the test, as it is now understood, requires the court to ascertain all the relevant facts, including the knowledge and beliefs of the defendant. Even though knowledge, in this context, must now be taken to be confined to actual and blind-eye knowledge, we see no reason in principle why a person's beliefs may not include suspicions which he harbours, but which in and of themselves fall short of constituting blind-eye knowledge. The existence of such suspicions, and the weight (if any) to be attributed to them, are then matters to be taken into account at the objective second stage of the test.* Or to make the same point in a different way, the existence of a legal technique for imputing constructive knowledge, if certain conditions are satisfied, should not be taken as implicitly restricting the scope of the subjective enquiry into a person's state of mind and beliefs at the first stage. *The state of a person's mind is in principle a pure*

question of fact, and suspicions of all types and degrees of probability may form part of it, and thus form part of the overall picture to which the objective standard of dishonesty is to be applied. (Emphasis added.)

[2433]In the instant case, the issue of dishonesty and belief or knowledge of certain matters on the part of the accused arise in two different but not unrelated scenarios in the factual matrix of the case. The first is the accused's assertion that he had no knowledge of the RM42m which arrived into his personal accounts from SRC. The second is that he maintained that he honestly believed that the SRC funds he utilised were donation monies from King Abdullah.

[2434]On the former, applying the subjective test, despite claiming ignorance of the transactions of the RM42m, the conduct and actions of the accused at the material time strongly suggest the contrary. This is because among others, he had considerable control over SRC given his specific powers under the M&A of the company as well as his role as MOF Inc the sole shareholder of SRC. Evidence also shows, in respect of the transactions, the crucial involvement of those (his own mandate holder and his principal private secretary) whom the accused himself confirmed to have been delegated with the responsibility of managing and supervising his personal accounts which received the impugned funds from SRC. There were also no complaints lodged by the accused with the bank or any other party at the material time on any of the transactions in his bank accounts, and he even issued the instruction (P277) to the bank on the transfer of RM32m to PBSB and PPC two days before the exact sum of RM32m entered his accounts from SRC.

[2435]In other words, the accused did not even meet the first test as to whether he honestly actually did not know of the transactions concerning the RM42m from SRC. Now, even if it were true that he did not, the application of the second stage objective test would absolutely demolish this assertion of absence of knowledge of the accused. This is attributed to, among others, his subsequent utilisation of the RM42m which would ordinarily, according to the standards of ordinary decent people require the account holder to ensure sufficiency of funds prior to spending. Towards the end of December 2014, at the time of the arrival of the RM42m from SRC it was clear that almost all of the funds from the alleged Arab donation had been used up. Suspicions must have been triggered. And even though the accused must surely had an extremely busy schedule day in day out given his position as the Prime Minister and Finance Minister of the country, it is precisely because of this reason — the sophistication and intelligence as well as the responsibility and reputation associated with the high office, that the accused must have ensured that all his financial dealings are above board and whiter than white. The credit of RM42m which arrived after a considerable part of the alleged Arab donation

had been used up and the continued availability of funds in the accused's accounts must have raised suspicion especially to a man of finance who was none other than the Prime Minister and Finance Minister of the country. Thus the dishonesty of the accused is manifest in this scenario. Even if he had met the first orsubjective test, which he does not, the accused fails the second, objective test.

[2436]The second situation is where he contended that he believed that the funds he utilised, that of SRC,was thought by the accused to have originated from the alleged Arab donations. His belief is said to be based on circumstances which prevailed since 2011 with the starting point being the meeting with King Abdullah in January 2010 in Riyadh. These include principally, as I have discussed earlier, among others, the information on the wish of the late Saudi monarch to make the donation conveyed to him by Jho Low, what Jho Low had accomplished that had impressed the accused and made him to trust Jho Low, the four Arab letters (D601–D604), and the submission of those letters to the bank and BNM.

[2437]Even if for argument sake, the subjective test is met, and the accused did truly hold such belief, the objective test when measured by reference to society's standards — of ordinary decent people — rather than the accused's understanding of those standards would resoundingly result in the clear finding that this belief that the funds came from King Abdullah is contrived. I have earlier set out at least ten reasons why the narrative of Arab Royalty donation predicated on among others the 'Arab letters' could not have been genuinely believed by the accused. Among others, I repeat that these include the non-confirmation with King Abdullah or the Government of KSA, the Arab letters being authored by a person unknown to the accused, the total absence of any details on the donation, the absence of any acknowledgment or any expression of gratitude for the donation at any time despite the accused having sent two letters to King Abdullah during the relevant period. Crucially, considering the context of time vis a vis the dates mentioned in the CBT charges, the return of a considerable amount of USD620m of the donation in 2013, without evidence of any explanation to the donor, let alone King Abdullah, and the further remittance received by the accused of much lower sums in 2014 unsolicited and unexplained, despite the return a year before. All these considerations would mean that the accused never honestly believed about the donation of monies from King Abdullah. He was therefore dishonest is contending that he held such a belief. The funds received in his personal accounts must have instead come from elsewhere, arranged by Jho Low. It bears emphasis that SRC was then under the control of the accused.

[2438]And it should also be mentioned that in the case of *Navaratnam v Public Prosecutor* [1973] 1 MLJ 154; [1972] 1 LNS 100, Ali FJ, for the Federal Court

discussed dishonest intention and held as follows:

> On the question of dishonest intention, we can do no better than quote a passage from the judgment of Fazl Ali J in *Harakrishna Mahtab v Emperor* AIR 1930 Pat 209. We do so because the learned trial judge in the instant case has referred to it as having been cited with approval by Ismail Khan J (as he then was) in the case of *Mohamed Adil v. Public Prosecutor* [1967] 1 MLJ 151. Fazl Ali J said:
>
> > It is not necessary or possible in every case of criminal breach of trust to prove in what precise manner the money was spent or appropriated by the accused, because under the law even temporary retention is an offence provided that it is dishonest; but the essential thing to be proved in case of criminal breach of trust is whether the accused was actuated by dishonest intention or not. As the question of intention is not a matter of direct proof, the courts have from time to time laid down certain broad tests which would generally afford useful guidance in deciding whether in a particular case the accused had or had not mens rea for the crime ...

[2439]In conclusion on this issue of the defence of the belief of the accused, in my judgment, the accused's belief that the funds in his accounts in 2014 and 2015 were from donation made at the behest of the Arab Royalty, specifically from King Abdullah, plainly cannot be a reasonable inference which can be drawn from the evidence as a whole. The accused must have known that that was not the case. The defence that the accused genuinely believed that the funds which came from SRC were part of the alleged personal donation from King Abdullah is contrived. It is therefore rejected.

Whether the utilisation of funds in 2011 and 2012 for CSR and for general elections in 2013 consistent with expression of support by King Abdullah

[2440]The defence then asserted that the spending out of Account 694 had always been in line with the purpose of the support of King Abdullah as expressed to the accused in the January 2010 meeting in Riyadh. They were according to the defence primarily for CSR initiatives, which largely on evidence meant contributions to UMNO and other BN components parties, for operational expenses and other community and social projects. This funding was to ensure the country's continued political stability, in accord with the wishes of King Abdullah.

[2441]Whilst the funds remitted into Account 694 in 2011 and 2012 were utilised by the accused through cheques generally for such CSR initiatives, those remitted in the same account in 2013 was employed for not only CSR activities and but also towards election funding to help ensure that BN, the ruling coalition led by the accused, be retained as government.

[2442]The defence also said that the accused's maintenance of Account 694 and its utilisation for political and other CSR initiatives including through UMNO and other BN components was in any event consistent with common practice. In the former Foreign Minister (DW6)'s testimony, he said that it has been a long-standing practice in UMNO for the President of the party to be in charge personally of most of the political funds.

[2443]The defence made much of the argument that the spending of the funds received in Account 694 was almost wholly for CSR related activities. And that, according to the defence, shows consistency with the accused's belief of the purpose of the support expressed by King Abdullah to the accused (which the accused said later meant financial support).

[2444]This is a conveniently generous interpretation of what purportedly had been said by the late Saudi monarch. The concern as the accused himself has testified was to ensure that Malaysia continue to be a peaceful multi-racial country and remain free from influences which distorted true Islamic teachings and advocates militancy, particularly also bearing in mind the spread of Arab Spring at the time. It was in that context that the Saudi monarch, in the words of the accused, had expressed support for the continued leadership of the accused. The accused construed the late monarch's wish of support as more for the accused to continue to lead Malaysia, but less about the underlying reasons for the said support. Thus even though termed as CSR activities, most of the spending, despite being allocated for community and social projects, were given to and also targeted to benefit UMNO and BN for popular political support, both of which were led by the accused during the material period. I have earlier pointed out the subtle discrepancy of the true objectives of the alleged support. According to the accused, King Abdullah was more focussed on the stability of the country be maintained in the face of the growing threat of Arab Spring then. On the other hand, the four 'Arab letters' emphasised more on the development of Islam generally.

[2445]In any event, the prosecution has shown evidence that several credit card transactions in 2011 to December 2012 had in fact been paid through funds debited from Account 694. These are hardly CSR related. They concerned hotel and golf charges and other purchases including for apparels. The accused had to admit that these were personal expenses purchased through the credit cards 'out of convenience' and not related to CSR initiative. Nevertheless, the accused tried to justify the same by contending that these were small expenses and he did not think it was significant given the total value of the donations received during the time.

[2446]The defence thus argued that the utilisation of 99.97% of the RM1 billion remitted into the Account 694 being for CSR initiatives and General

Elections in 2013 was conduct corroborative of the accused's belief that the funds were donations to be utilised by him towards, inter alia, his CSR and political causes to enable the leadership and government of the day to continue and Malaysia's stability preserved. This was in line with the general concerns that King Abdullah had expressed in his intimations of support.

[2447]This in my view is no justification. Surely one cannot argue that any unauthorised use of funds is acceptable if it is small in comparison to the total available funds. The total amount for the transactions highlighted by the prosecution was less than RM330,000. This, the defence proudly professed, amounts to about a mere 0.01% of the total RM3.2 billion received from 2011–2013, and about 0.03% of the RM1 billion utilised from Account 694 Account (for completeness, less the USD620m which was returned in 2013 and the RM162m transferred to fund the new Accounts 880, 906 and 898). The balance 99.97%, as the accused testified, was generally used for CSR initiatives being political, social and charitable causes and for the General Elections in 2013.

[2448]But the fact remains that the accused did use a portion of the funds for his own personal expenses. And further, in any event, again, the CSR expenses, which mainly were also relatable to UMNO and BN too cannot be characterised as not for the accused's personal benefit and advantage. Nor can reliance be placed on the fact that the notations in the letters purportedly from the Arab Royalty evidencing the donations (D601, D602, D603 as well as D604) had stated that the accused had complete discretion over the use of the funds. Not when the accused did not even bother to check and verify their authenticity or even identify the person who purportedly wrote these letters.

[2449]The summary of the utilisation of the funds by the accused in the same three accounts from the transfer of RM162m from Account 694 to Account 880 in August 2013, is also outlined in the defence's Annexure 9 of the bundle of annexures. The defence highlighted that about 98% of the funds were utilised towards contributions to political parties, political and social CSR initiative and charitable or NGO contributions. The usage in the funds in this regard is argued to be consistent with the state of mind that the monies in the account are from legitimate sources.

[2450]I do not see how this advances the defence of the accused. In any event, the issue is not, as submitted by the defence that it would make no logical sense for a sitting Prime Minister to risk cheques issued for political, social and charitable causes to be dishonoured. The complete answer to this submission is that the task entrusted to Jho Low, Datuk Azlin and Nik Faisal was precisely just that. Never let any of the cheques be dishonoured. And they did on evidence discharge this responsibility, despite the many and frequent payments

of cheques by the accused running into hundreds of millions in RM. There was never any real risk of any cheques being rejected to start with.

[2451]The defence then continued with the same narrative of no change in circumstances that justified the belief held by the accused, in that the spending in 2014 and 2015 was also predominantly for CSR activities, like the trend in the earlier years in 2011–2013. And the defence helpfully provided in summary fashion, a table of spending in 2014 and 2015, as follows:

Total Utilised (Accounted And Unaccounted)			RM261,313,399.91
Total Utilised Accounted In Evidence	RM210,748,071.78		
Cheques to political parties	RM95,090,000	45%	36.8%
Cheques for political use and social CSR	RM81,763,260	39.3%	31.3%
Cheques for charity/NGO	RM29,629,694	13.7%	11%
Cheques for repairs and renovation to Langgak Duta and Sri Kayangan	RM233,800	0.1%	0.09%
Credit card transaction auto debit	RM748,583.62	0.4%	0.3%
Credit card expenditure for gift for foreign leader (De Grisogono)	RM3,282,734.16	1.5%	1.3%
	Other Cheques		RM50,565,328.13
	(No Account In Evidence)		19%

[2452]The above shows that out of approximately RM261m utilised by cheques and credit card transactions, about 81% of the cheques and transactions were accounted in the evidence with a balance of about RM51m worth of payment by cheques issued not produced in evidence. The above breakdown, the defence submitted, confirms that 98% of the utilisation of

funds in 2014 and 2015 from the accused's personal accounts which are accounted in evidence were towards CSR initiatives being political, social and charitable causes.

[2453]Again, this merely repeats the same line of argument, that the spending in 2014 and 2015 follows the earlier trend, and thus this fortifies the defence that the accused had continued to hold to the same belief on the source of the funds. I repeat that the accused's definition of CSR includes a considerable range of activities which are driven by political organisations, with a patent association with the accused who during the entire period led the national coalition party of BN. These activities were plainly therefore also for his personal benefit and advantage of remaining in political power. Thus, there is nothing particularly notable, let alone noble, about the consistency in the purposes of the spending by the accused, in 2014 and 2015, just like in the earlier years.

[2454]In any event the fact remains that the accused did spend RM3.2m out of the said foreign remittances towards the purchase of jewellery in August 2014 from De Grisogono in Italy, according to the accused, by his wife, allegedly as a gift presented to the Her Excellency Noor Abdulaziz Abdulla Turki Al-Subaie, the wife of Sheikh Ahmed bin Jassim Al Thani, a Qatari businessman, politician and a member of the royal family who at that time was the Prime Minister of Qatar.

[2455]Just as conveniently however, the letter adduced by the defence which purportedly reflected Her Excellency's expression of gratitude (IDD778) for the gift (incidentally, none from the accused to King Abdullah) could not be marked into evidence as the original could not be located. Nor could Her Excellency make it to this court to confirm the same.

[2456]There were also several credit card expenditures from September 2013 onwards, for which the accused admitted were towards hotel charges and purchases of items including a purchase of a watch worth RM466,000 in Honolulu in December 2014 which was a gift to his spouse. The defence emphasised, in trying to justify these expenses, that these were small amounts and not significant considering the size of the donations from the Arab Royalty.

[2457]The defence maintained that taking into consideration all the expenditures through credit cards, including the De Grisogono purchase and the cheques used towards repairs to the residences, which were not disputed to be the venues primarily used by the accused for meetings in Kuala Lumpur and his parliamentary constituency of Pekan, these expenditures only amounted to 2% of the accounted funds utilised and only about 1.69% of the total RM261m utilised.

[2458]I do not think it is correct for the defence to attempt to justify these personal expenses on the basis that they represented less than 3% of the total utilised sum. It is preposterous. The total utilised sum itself as admitted by the defence is a staggering RM261m. This is an extremely large amount of money by any standard.

Evidence from other defence witnesses

[2459]I should also for completeness make reference to the testimonies of other witnesses called by the defence, other than merely formal ones, in order to provide a full picture of the case of the defence. However, these other witnesses did not provide much support to the defence of the accused and most of the evidence they gave is not even relied on in the submissions of the defence at the end of the trial.

The testimony of Latheefa Koya (DW13)

[2460]Latheefa Koya (DW13) was the Chief Commissioner of the MACC. She was summoned as a witness after the defence team said they wanted to admit two of nine audio recordings that the MACC had revealed to the public, in order to support the defence of the accused, claiming these were beneficial to the defence.

[2461]The accused had earlier filed a notice of motion under s 51 of the CPC for the release of the nine recordings to the defence. This was resisted by the prosecution who had also filed its written submissions against the same. At the date appointed for the hearing of the motion however, the prosecution decided to consent to the application. This then led to the defence to pursue the matter and summon the Chief Commissioner of MACC.

[2462]Whilst the defence made it clear, unsurprisingly, that the purpose of putting DW13 on the witness stand was to ascertain the admissibility of the recordings in court, before the same — particularly two of the audio recordings said to be beneficial to the defence of the accused — could be accepted as evidence in this trial, the questions posed to her, the accused's own witness, by the defence ironically and pointedly challenged her decision, on behalf of the MACC, to have released these recordings to the public at a press conference on 8 January 2020 this year in the first place. The defence maintained that these recordings failed to meet the legal requirements of history, provenance and originality, which precisely are the tests for admissibility, in order for the recordings to be accepted as evidence.

[2463]Based on the application by the defence under s 51 of the CPC, these recordings allegedly included conversations featuring the accused, his spouse, a

former DPP (DW17) and a former principal private secretary of the accused (DW16).

[2464]DW13's testimony was clear in that the nine audio recordings came in the form of thumb drives, each stored in one drive, which were all placed in an A4-size like envelope which had been left in the postal box at the house gate of the special officer of the Deputy Chief Commissioner (Operations) of MACC, who collected the envelope in the morning of 3 January 2020. The MACC, according to DW13 could not determine who had placed the envelope containing the nine thumb drives in the postal box, let alone ascertain who performed the recordings.

[2465]The argument of the defence is that if these could not be admissible, it was improper for MACC to have made them public since they could never be admitted in a court of law. DW13 however vehemently disagreed, saying whilst she could not confirm the authenticity of the audio recordings — because even the source and maker is unknown to MACC — she was not at the material time of the press conference concerned whether the recordings could be used in any court proceedings, but more for the police who are investigating the matter to use the recordings as sources of information or intelligence which could be used to inquire with the persons suspected to be involved in the conversations contained in the nine recordings.

[2466]In reply to the question why the MACC had not conducted the investigations confidentially behind closed doors, the witness maintained her stand that it was in the public interest that such disclosure should be made on alleged wrongdoings at the highest level of the government. The witness considered the recordings 'authentic' in the sense that MACC was able to recognise the voices featured in the nine audio recordings, especially when checked against the events and their dates as mentioned in the contents of the recordings which also ran smoothly. DW13 testified that other than that, MACC did not perform any forensic examination on the recordings, and added that that was why the same had been delivered to the RMP for investigations.

[2467]Upon my query whether the defence was trying to establish authenticity on the basis of s 43 of the MACC Act which renders intercepted communication which has been pre-authorised by the public prosecutor, the defence replied in the affirmative, and then sought DW13's confirmation whether the nine recordings were made by MACC.

[2468]Section 43(1) reads as follows:

43 Power to intercept communications

(1) Notwithstanding the provisions of any other written law, the Public Prosecutor or an officer of the Commission of the rank of Commissioner or above as authorised by the Public Prosecutor, if he considers that it is likely to contain any information which is relevant for the purpose of any investigation into an offence under this Act, may, on the application of an officer of the Commission of the rank of superintendent or above, authorise any officer of the Commission:

(a) to intercept, detain and open any postal article in the course of transmission by post;

(b) to intercept any message transmitted or received by any telecommunication; or

(c) to intercept, listen to and record any conversation by any telecommunication, and listen to the recording of the intercepted conversation.

(2) When any person is charged with an offence under this Act, any information obtained by an officer of the Commission in pursuance of subsection (1), whether before or after such person is charged, shall be admissible at his trial in evidence.

(3) An authorisation by the Public Prosecutor or an officer of the Commission of the rank of Commissioner or above as authorised by the Public Prosecutor under subsection (1) may be given either orally or in writing; but if an oral authorisation is given, the Public Prosecutor or the officer of the Commission of the rank of Commissioner or above as authorised by the Public Prosecutor shall, as soon as practicable, reduce the authorisation into writing.

(4) A certificate by the Public Prosecutor or the officer of the Commission of the rank of Commissioner or above as authorised by the Public Prosecutor stating that the action taken by an officer of the Commission in pursuance of subsection (1) had been authorised by him under that subsection shall be conclusive evidence that it had been so authorised, and such certificate shall be admissible in evidence without proof of signature thereof.

(5) No person shall be under any duty, obligation or liability, or be in any manner compelled, to disclose in any proceedings the procedure, method, manner or means, or any matter related thereto, of anything done under paragraph (1)(a), (b) or (c).

(6) For the purpose of this section, 'postal article' has the same meaning as in the Postal Services Act 1991 [Act 465].

[2469]The witness was initially clear in her testimony that this was not produced by MACC. So the issue of authorisation did not arise. But then when repeatedly asked, she also responded with the answer that she could not confirm who made the recordings. This then still left open the possibility, quickly seized upon by the defence, that it could have been a mission unknown

to her personally (however unlikely) but was nevertheless authorised by the public prosecutor, which arguably could mean that the recordings were admissible, based on the wordings of s 43(5) of the MACC Act.

[2470]Later however, when the former attorney general (DW14) testified, he confirmed that as the AG at the material period during which the DW13 said the recordings were made of the nine conversations, DW14 had never granted any consent for any wire-tapping or interception to be performed. This conclusively meant that the nine recordings cannot be admitted in this trial.

[2471]As such, admissibility cannot be predicated on s 43 of the MACC Act. In any event there was no evidence that the nine recordings could have been deemed authentic for the absence, so the defence submitted, of any explanation on their fulfilment with the requirements on their history, provenance and originality in accordance with the authority of the English case of *R v Maqsud Ali; R v Ashiq Hussain* [1965] 2 All ER 464, albeit the case was not produced to the court.

[2472]There is no evidence who made the recordings, and thus the maker of these 'documents' (as widely defined in s 3 of the Evidence Act 1950) could not be called to testify on their authenticity, not therefore conforming with the best evidence rule, and the requirements of Chapter V of the Evidence Act 1950 on Documentary Evidence.

[2473]The evidence of DW13 in this trial, if nothing else, must lead to the finding that the test of authenticity to determine admissibility was manifestly not met. Indeed it is also not apparent from the case of the defence and the questions posed to the witness as to the relevancy of the two audio recordings targeted by the defence. Because the approach of the defence appeared to deal with the issue of authenticity before everything else. But it was clear from the testimony of the witness, even earlier on, that authenticity in the strict sense of admissibility in court, could not be established.

[2474]Yet the defence continued to examine the witness on matters which further fortified the lack of authentication of the nine audio recordings, in apparent disadvantage of the defence's stated effort to admit the same, but more to discredit the decision of DW13 to have exposed the nine recordings. I should add that the complaint of the prosecution that this strategy of the defence appeared to be for collateral purposes — in that the matters raised ought to be ventilated in a different forum, such as in a prosecution relating to the alleged contents of the recordings, if any — cannot be outrightly dismissed.

[2475]Furthermore, the literature on whether the courts should exercise its discretion to exclude relevant admissible evidence generally concern evidence

against the accused and focuses on the whether the prejudicial effect of the evidence outweighs its probative value. In the case before me, the situation is starkly different. The prosecution was not bothered with the nine audio recordings in the first place. It was the defence who was interested in admitting the same even on this argument, saying that even if improperly obtained it should be admitted. But I stress that the defence failed to prove authenticity of the same to start with, not to mention on its relevancy.

[2476]There is also no valid basis to the faint suggestion of the defence that the nine audio recordings could still be admitted on the authority of *Kuruma, Son of Kaniu v R* [1955] 2 WLR 223; [1955] AC 197 (also not produced to the court). This Privy Council decision is the leading authority for the trite law that if evidence is relevant to the matters in issue, it is admissible, and if it is admissible, the court is not concerned with how the evidence was obtained. In the instant case before me however, the relevancy was not established and in respect of admissibility which was dealt with first, the defence could not as mandated by Chapter V of the Evidence Act 1950 elicit any evidence to fulfil the method of proof as even the origin let alone the maker of the audio recordings could not be identified.

[2477]In other words, *Kuruma, Son of Kaniu v R* has no relevance to the situation before this court. For completeness, I should state that the position on this in this country is as has been held by the Supreme Court in *Ramli bin Kechik v Public Prosecutor* [1986] 2 MLJ 33; [1986] 1 CLJ 308; [1986] CLJ Rep 243 which approved the statement by Lord Diplock in the House of Lords decision in *R v Sang* [1979] 2 All ER 1222 who on the question of the exercise of discretion held thus:

> (1) A trial judge in a criminal trial has always a discretion to refuse to admit evidence if in his opinion its prejudicial effect outweighs its probative value.
>
> (2) Save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after commission of the offence, he has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means. The court is not concerned with how it was obtained.

[2478]When asked by the defence about the process of conducting an interception under s 43, the witness refused to answer, citing s 43(5) of the MACC Act which, again, reads:

> (5) No person shall be under any duty, obligation or liability, or be in any manner compelled, to disclose in any proceedings the procedure, method, manner or means, or any matter related thereto, of anything done under paragraph (1)(a), (b) or (c).

[2479]After hearing short submissions by both parties, I ruled that DW13 was entitled to rely on the provisions of the law and did not need to answer the questions posed by the defence on the point. The witness cannot be compelled to disclose in any court proceedings as to the procedures how MACC went about intercepting phone calls or to disclose how MACC officers conducted their duties in phone tapping in view of the clear language of s 43 of the MACC Act.

[2480]Asked whether MACC, then led by her, had made any attempts to ascertain if a large portion of SRC's RM4 billion (being the loan from KWAP) was actually kept at BSI Bank in Lugano, Switzerland, DW13 maintained that she left it to her officers in the investigation and prosecution departments to do their work, and that in any event, the matter was part of an on-going investigation such that any disclosure could compromise the investigation.

The testimony of R Rajagopal (DW15)

[2481]Defence witness No 15 was Assistant Commissioner of Police R Rajagopal, a Deputy Director at the Commercial Crime Department, and who was the police's investigating officer for the 1MDB case. DW15 gave evidence that the former MACC Chief Commissioner Tan Sri Abu Kassim Mohamed had in a special task force meeting held on 4 July 2015 which DW15 attended on behalf of the Inspector General of Police, suggested charging the former Prime Minister (the accused) with offences related to 1MDB and SRC. However this was not acted on by the attorney general then who was himself succeeded by the new Attorney General (DW14) on 27 July 2015. The version of DW15 on the meeting was repeated by DW17 in DW17's testimony as the latter informed the court that DW15 had told DW17 about the same.

The additional testimony of Tan Sri Dzulkifli Ahmad (DW17)

[2482]DW17 gave evidence that he was some time in November 2015 told by the police's investigating officer on the 1MDB investigations (DW15) that in a meeting of the Task Force (collectively led by the attorney general, the Inspector General of Police (IGP), the Chief Commissioner of the MACC and the Governor of the Central Bank to coordinate efforts into the investigations on 1MDB-related matters) on 4 July 2015 at the private residence of the AG which DW15 attended as a representative of the IGP, the former MACC Chief Commissioner had suggested that the accused be prosecuted.

[2483]DW17 said that he was shocked upon being told by DW15 that such a suggestion had been made because the investigation papers by then (4 July 2015) had yet to be completed, and various statements from a number of vital witnesses such as Nik Faisal, Jho Low, Eric Tan, Prince Saud, Datuk Suboh, and

even the accused himself, had not yet been recorded by MACC. A person is normally charged only after the investigation papers are completed.

[2484]The MACC instead only subsequently recorded statements from Datuk Suboh in Abu Dhabi, Nik Faisal in Indonesia, Jho Low in Abu Dhabi, and Eric Tan and Prince Saud in Riyadh later in November 2015. And in December 2015, the MACC recorded the statement of the accused. DW17 also agreed that based on Prince Saud's four letters, the investigators concluded that the monies were donations, and not from 1MDB.

[2485]When cross-examined, DW17 said he did not know that when DW15 testified that the former Chief Commissioner of MACC at the meeting of the task force on 4 July 2015 had suggested that the accused be charged, DW15 also said the former Chief Commissioner had said that on the basis of the evidence of the money trail from SRC.

[2486]One observation. DW17 made much of the fact that the two media releases of MACC in early August 2015 had already stated that the funds deposited into the accounts of the accused was a donation. But the investigation to verify the four letters on the alleged donation with the purported signatory only took place in Riyadh late November 2015.

[2487]And further, the results of the investigative trip was by any standard, and at least in my judgment, as discussed earlier, anything but satisfactory to support the theory of the donation from the late King Abdullah. In any event, the defence did not call the true donor or contributor of the RM2.6 billion or any part thereof, whoever the defence considered this person could have been, as a witness in this trial. Not even anyone who was involved in the process of making that remittance.

The testimony of Tan Sri Shukry Salleh (DW16)

[2488]The 16th defence witness was the accused's principal private secretary who had testified that the accused had instructed him to contact DPP Dzulkifli Ahmad (DW17) to obtain copies of bank statements of his accounts, in order to show movements of funds in and out of the accounts. DW16 told the court that on the same day of 26 February 2016 he telephoned DW17 to relay the request by the accused. When asked how he could be certain of the date of the conversation, DW16 explained that this was based on his mobile phone's call history as recorded in his telephone bill. And when examined as to how he knew the accounts in question, the witness said when the accused asked him to make that request, the former was holding the flowcharts similar to the ones held up by the former attorney general (DW14) during the press conference on 26 January 2016 which had cleared the accused of any criminal wrongdoing.

[2489]However, DW16 said he unsure whether DW17 had acted on the request and could not recall if DW17 or anyone had passed him the bank statements after the request was made as DW16 had other matters to attend to. In his testimony, DW17 confirmed he did cause the documents to be furnished to the accused.

[2490]Nevertheless, as mentioned earlier, DW17 agreed that the decision to NFA the IP on the SRC investigation was based on evidence disclosed as of 26 January 2016. He also admitted that before the present charges were first filed on 4 July 2018, based on news report, he had read that the MACC had recorded statements from other individuals. He also agreed when shown by the prosecution that the media release of MACC dated 5 August 2015 (D806) also mentioned in para. 3 that investigation was still ongoing.

[2491]DW17 also gave evidence that the former principal private secretary of the accused, Tan Sri Shukry Mohd Salleh (DW16) had asked him in a telephone conversation to provide copies of the bank statements of the accused in the possession of the AGC, in a request that was made on 26 February 2016 which was after the AG had decided to close both the SRC and RM2.6 billion 'donation' cases.

[2492]DW17 confirmed the call from DW16 on the request but the latter did not tell him why he wanted them. But DW17 had caused to be prepared the required documents to be given to the accused nonetheless.

[2493]Although initially unwilling to answer the question on the basis that the police are in the midst of investigating the audio recordings and that DW17 himself had been summoned to assist the investigation to give his statement, he said he was willing to answer if compelled by the court to do so. On the application of the defence, I ruled that DW17 must answer the question and pursuant to s 132(2) of the Evidence Act 1950 there will be no prosecution for the testimony of the accused in answer to this question unless he gives false evidence.

The testimony of Kamaruddin M Ripin (DW18)

[2494]The two media release by MACC dated 3 August 2015 (D805) and 5 August 2015 (D806) were confirmed by Kamaruddin M Ripin, a Deputy Director of Strategic Communication at MACC as having been issued by MACC. He was the defence's 18th witness. DW18 testified that the two releases must have, in accordance with internal policy, been approved by the top management of MACC, which consisted of the four highest ranking officials in the organisation, led by its Chief Commissioner who at that time was Tan Sri Abu Kassim.

Statements recorded by MACC from Jho Low, Nik Faisal and Jerome Lee

[2495]In the course of the defence case, the prosecution informed this court that the prosecution wished to supply to the defence the statements taken by MACC from Jho Low, Nik Faisal and Jerome Lee. The prosecution did not dispute that these were individuals who could not be found despite the efforts by the authorities to trace them. This represented a change in stance of the prosecution which had earlier refused the request by the defence for among others, statements recorded by the MACC from the three.

[2496]Two MACC officers — Azhari Karim (DW10) testified to have taken a statement from Jerome Lee on 22 July 2015 and Ting Ing Ping (DW11) confirmed that he had taken a 26-page statement from Jho Low on 27 November 2015 at Rosewood Hotel in Abu Dhabi. Both witnesses confirmed the respective statements were taken from the two, and were signed by the two. They were marked D797 and D798 respectively.

[2497]The statements of Nik Faisal was recorded by the defence's final witness, Regjit Singh Harbanes Singh (DW19), who was an Assistant Commissioner at Forensic Accounting Unit at MACC. He confirmed to have been directed to travel to Jakarta with a small team of MACC officials to record the statement of Nik Faisal. DW19 testified that he had made two trips to the Indonesian capital for such purpose. The first occasion on which the statement of Nik Faisal was recorded by DW19 was on 17 October 2015. The session then continued on 31 October 2015. Both occasions took place at Manhattan Hotel in Jakarta and the witness also confirmed that Nik Faisal was accompanied by his lawyer, Datuk Selva Mookiah. The defence then asked that the statements given by Nik Faisal be admitted as evidence. This was marked as D807. This is thus the last exhibit tendered in this trial.

[2498]It is however trite that admissibility of the statements and the weight to be given to these admitted statements are two different matters. I refer again to the case of *Public Prosecutor v Jitweer Singh a/l Ojagar Singh* [2014] 6 MLJ 222; [2014] 1 CLJ 433 where the Federal Court said thus:

> [38] That s 112 statement of Khairuddin was untested by cross-examination. It did not have the weight of sworn testimony. Yet it was evidence. It could not be discarded. Weight must still be given to it. It turned out that the evaluation of weight was not a Gordian Knot. We tested the facts asserted by Khairuddin against the established facts.

[2499]The undeniable fact remains that these D798, D807 and D797 are statements of individuals who can no longer be found. They are still hearsay in nature and their veracity and accuracy cannot be tested in cross-examination.

In addition, great caution must be exercised by this court when assessing the weight and degree of credit to be attached to the statements made by individuals who are not disinterested.

[2500]In the case of *Public Prosecutor v Mohd Jamil bin Yahya & Anor* [1993] 3 MLJ 702; [1993] 1 LNS 95 KC Vohrah J, on this subject, held that:

> In my view, the weight and degree of credit to be attached to a statement by a declarant under para (i) who is patently not disinterested must be examined with the greatest of caution lest false stories or a false colouring to the stories given by the declarant in the statement makes the court draw a jaundiced view of facts which cannot be verified through the cross-examination of the declarant and facts which may falsely implicate an accused. And more so where an accused faces a charge carrying a mandatory sentence of death on conviction on the charge.

[2501]In my view, the statements from individuals like the three in the instant case have little probative value because of two principal reasons. First, the statements could not be cross-examined and secondly, the makers were not disinterested witnesses. In the case of the statements from Jho Low (D797) and Jerome Lee (D798) the exhibits are additionally particularly devoid of any details of probative value given the many denials and claims of absence of knowledge.

[2502]Further, in the case of Nik Faisal, he is not merely an interested witness but had also plainly played an active role in SRC, GMSB and was the official mandate holder of the accused's accounts. He was assigned the task to ensure the accused had sufficient funds in the accused's personal bank accounts. Nik Faisal also had the bank statements and knowledge of the transfer of SRC funds into the accounts. Evidence shows Nik Faisal signed the instructions for the transfers of the total of RM42m which flowed into the accused's Account 880 and Account 906. In his statement, contrary to the evidence of his key role in the transactions, he denied knowledge and also said the accused too had no knowledge about the transfers. It is very likely that he is attempting to exonerate himself and the accused from any wrong doings. His statement is not credible and cannot be relied upon.

[2503]After all, the red notices issued to Interpol made clear that there were charges intended to be filed against Jho Low and Nik Faisal. Evidence demonstrates they are not disinterested and therefore they had every intention to ensure self-preservation. And on top of all that, the fundamental fact is that none of the three were available in court to be cross-examined, thus denying the trial that critical process of ensuring the matters stated in the statements are verified by cross-examination.

[2504]It is observed that the defence too contended that no weight ought to be given to the statements taken from Jho Low and Jerome Lee, but suggested that Nik Faisal's statement (D807) should be assessed on its inherent probability as it corroborates the evidence of the accused on his non-involvement in SRC. I do not think this is correct. Just because Nik Faisal stated something that is favourable to the position of the accused does not mean that it ought to be believed. Whilst it may be consistent with the defence of the accused, it is also self-serving on the part of Nik Faisal.

[2505]More importantly, evidence as established in the prosecution case already shows that Nik Faisal was the link person between the board of directors and the accused, and despite Nik Faisal being removed from the CEO position in SRC, he however was made to remain as a Director and an authorised signatory of the company. And crucially, notwithstanding this move by the Board of SRC against Nik Faisal, the accused, despite being the advisor emeritus and sole shareholder (as MOF Inc) of SRC, continued retaining him to handle the accused's own personal accounts.

[2506]The status of Nik Faisal as a close associate of the accused thus makes his statement inherently improbable to be believed especially considering his oversight role in relation to SRC and GMSB, and over the RM42m which belonged to SRC, which sums of monies did flow into Accounts 880 and 906 of the accused on the dates as specified in the three CBT charges against the accused. And at any rate, the veracity of Nik Faisal's statement could not be tested and there was no witness that could confirm any of its contents.

[2507]In my view the weight and credit to be attached to these statements for the reasons I have just stated cannot be more than merely minimal and trifling, if at all.

Other issues raised by the defence

[2508]The defence raised many other issues to advance its defence and in seeking to contradict and rebut the prosecution case. These, which may include some aspects that have already been evaluated and addressed by this court earlier in this judgment are, for completion discussed further, albeit in parts in summary fashion, hereunder.

Whether the February 2015 transactions intended by the accused

[2509]The defence argued that the RM10m that went into the account of the accused pursuant to the 10 February 2015 transfers was not planned ahead but was caused by shortages of funds due to cheques being issued by the accused. In

other words, the accused had issued cheques when funds were low, resulting in Jho Low having to take steps to pump in funds to avoid the cheques from being dishonoured.

[2510]I do not see how this argument can assist the accused. It is as clear as day that the funds were sourced from SRC in two separate tranches of RM5m each respectively on 5 and 6 February 2015 through the familiar route of GMSB and IPSB to be channelled into the accounts of the accused, to ensure the cheques issued by the accused do not bounce. The exact total of RM10m that left SRC was ultimately utilised and spent by the accused. There is no complaint by the parties transmitting the RM10m to the accused nor did the accused make any complaint of this transaction.

[2511]It bears emphasis that evidence on the transfers of the SRC funds in December 2014 and in February 2015 shows the involvement of Nik Faisal (the mandate holder for the accused) in the flow of funds from SRC to GMSB and from GMSB to IPSB, and the involvement of Datuk Azlin in the remittances from IPSB into the personal accounts of the accused.

[2512]It has also been established that the accused had an overarching control over SRC, and entrusted with dominion over the property of SRC. The testimony of the accused further confirms the role of Jho Low, Datuk Azlin and Nik Faisal in the management of the accused's personal accounts, primarily to ensure sufficiency of funds.

[2513]The defence raised the point that there was no premeditation when the RM10m left SRC and entered the accounts of the accused as the overdraft occurred around the same time. The expenditures of the RM10m by the accused was also not premeditated as the cheques were issued before the RM10m even arrived. In other words, the defence is saying that the accused could not have known about this transaction from SRC.

[2514]As I have discussed earlier, the transfer of the funds out of SRC and into the accused's accounts was to cover the cheques issued beforehand by the accused. The issue of whether the same is premeditated is irrelevant because he knew that Jho Low, Datuk Azlin and Nik Faisal would ensure that the funds needed would be made available at the material time to avoid any cheques from being rejected. The accused could issue the cheques, even to the extent of his accounts going into overdraft regardless of the account balances which he was aware of as he would always be reliant on Jho Low, Datuk Azlin and Nik Faisal and anticipate future cash deposits or transfer of funds in order to ensure that the cheques he issued do not bounce.

[2515]In any event evidence has also established, as I have shown that there were also many instances where Jho Low already knew in advance of the intention of the accused to issue cheques, thus negating the alleged reactionary approach of Jho Low.

[2516]As mentioned, the accused knew that his team would ensure the funds would always arrive soon after if the balances were low or in overdrawn position. Even if the funds came late, the accused knew that AmBank would still not let the cheques bounce as Jho Low and Nik Faisal would be communicating with AmBank and assured PW54 that the funds were coming. I cannot but agree with the submission of the prosecution that the fact that the accused's accounts always went into overdraft even though they never had an overdraft facility shows just how highly regarded the personal accounts of the accused were with AmBank. This of course could not have at all been surprising since these were the personal bank accounts of the Prime Minister and Finance Minister of Malaysia.

[2517]Evidence has shown that after the receipt of the RM10m and the regularisation of the overdraft status in the account, the remaining balance was then utilised by the accused for his personal expenditures from 10 February 2015 onwards. These expenditures are through issuance of cheques.

[2518]The further submission of the defence is that the RM10m from SRC was primarily utilised for the regularisation of the overdraft status in the account. The issuance of the cheques was mostly done before the arrival of the RM10m, hence the overdraft status. This therefore, according to the defence, negates the knowledge of the accused of the impending funds arriving from SRC on 10 February 2015.

[2519]This assertion is unmeritorious. I cannot emphasise enough that the accused already had an arrangement with Jho Low, Datuk Azlin and Nik Faisal for the latter to ensure funds would always be available in his accounts. This they had, on evidence, demonstrated their efforts to such effect with great dedication, invariably successfully. The accused knew that his account balances would always be regularly and constantly replenished, and in any event his cheques would not be allowed to be dishonoured.

[2520]From his communication with all of Jho Low, Datuk Azlin and Nik Faisal who helped manage his accounts, the accused must have known the balances and the sources of funds in his accounts when he issued cheques, and he also had the additional and crucial comfort that even though he knew the balances were insufficient he could continue to issue cheques as he had the knowledge that his team will ensure funds would be flowed in to cover the

expenditures and that AmBank will also grant indulgences to the operations of the personal accounts of the Prime Minister.

[2521]The accused must therefore already have had the requisite knowledge of the impending funds from SRC as he was already prepared to spend it by issuing the cheques well beforehand.

[2522]The defence further contended that the BBM chats (P578) reveal transactions involving cash deposits into the accused's accounts, also to ensure the bank accounts are regularised. Letters were written by Nik Faisal (P57(23) and P638) and sent to AmBank to explain these cash deposits as the bank was concerned that these deposits could raise money laundering issues. The accused denied any knowledge of the letters.

[2523]Again the trend is similar. The arrival of the cash deposits was to activate the accounts with funds for cash deposits are the fastest route to ensure that the account is regularised. Despite the denial, the accused seemed aware of the necessity of such cash deposits when the accused's accounts were short of funds.

[2524]In the notes of proceedings dated 8 January 2020 — DW1:

> S: So since Dato' Azlin was managing your account, you were never informed by Azlin that in fact there were no sufficient funds on many occasions for you to issue the cheques? Is that what you are saying?
>
> J: Basically he only informed me that I could issue the cheques, yes.
>
> S: So that would mean the account was overdraft, cash had to be paid in before he informed you that you could issue the cheques. That would be the sequence. Correct?
>
> J: Yes that would have been, yes.
>
> S: But you don't know anything about the ...
>
> J: Not about the cash transfer.
>
> S: In fact I am putting it to you sir, these cash payment were made by you and Jho Low. You agree or disagree?
>
> J: I disagree.

[2525]It does seem somewhat odd that whilst he tried to distance himself from the cash deposits, suggesting he was not in the know, the accused agreed in the cross-examination that cash would be required to regularise the overdraft status of the accounts. It is inescapable that the only clear inference is that the accused knew about the cash deposits which were also intended to enable the accused to meet his financial expenditures.

Whether evidence in the BBM chats (P578) rebutted

[2526]This is yet another repeat of an argument which has been considered at the end of the prosecution case. But this is now to be examined vis a vis the defence evidence, which on this issue, the testimony of the accused himself.

[2527]The defence contended that Jho Low did not have knowledge of exactly when and how many cheques the accused was issuing. He was merely reacting to the action taken by the accused in issuing the cheques. Jho Low would then take steps to contact Joanna Yu (PW54) to ensure the cheques issued do not bounce whilst efforts were underway to pump in funds into the accused's accounts.

[2528]I have already analysed the evidence on this. As shown earlier, it is untrue that Jho Low had in all cases to react to actions taken by the accused. It does not in any event matter whether or not Jho Low knew of the cheque issuance in advance because in all situations cheques could not be allowed to bounce and funds must be put in the accounts.

[2529]In support of its contention, the defence denied that the BBM messages (P578) between Jho Low and PW54 also demonstrate prior conversations between Jho Low and the accused. But it is clear from the BBM messages that the accused had communicated with Jho Low as for example reflected in the BBM chats in P578 vis a vis issuances of cheques and credit card clearances in August 2014 (the Italy transactions) and December 2014 (Hawaii). Crucially, the accused himself admits this.

[2530]After all, quite apart from the evidence in the BBM conversations (P578), in the course of his long testimony, the accused himself admitted to many things that Jho Low did. The accused said that Jho Low was communicating with the accused with regard to the bank account balances, Jho Low was communicating with Datuk Azlin also with regard to the bank account balances, Jho Low was tasked together with Datuk Azlin and Nik Faisal to maintain sufficient funds in the bank accounts, Jho Low was dealing with the purported incoming Arab funds or foreign remittances into the bank accounts of the accused, Jho Low was dealing with Datuk Azlin and Nik Faisal on the issuance of cheques by the accused and ensuring that there were sufficient funds at all times so that the cheques do not bounce; and that Jho Low was most probably informed by Datuk Azlin or Nik Faisal to put funds into the bank accounts.

[2531]The depth and breadth of the involvement of Jho Low in maintaining the personal bank accounts of the accused is unmistakable. On this basis alone, the necessary inference must be that for such purposes, the two must have

certainly communicated with one another. Jho Low could not have carried out this task without having access to the accused. Another of the defence witness, DW8 too testified that the late principal private secretary of the accused told DW8 that Jho Low had direct contact with the accused.

[2532]It is nonsensical to believe that Jho Low would have to contact Datuk Azlin or Nik Faisal first before waiting for them to respond with instructions from the accused before Jho Low could even execute those instructions, especially since Jho Low had higher stature and closer relationship with AmBank, even from previous corporate dealings.

[2533]In truth and as is manifest, the accused tried to detach himself from Jho Low (like from his bank statements) because that would readily expose him to the imputation of the knowledge of his bank balances and the RM42m from SRC in his accounts. The evidence shows that such attempts cannot succeed.

[2534]In any event, the accused's denial of communication with Jho Low is futile. First, his own testimony defines a wide remit of a task given by the accused to Jho Low on the management of the accused's personal accounts. Secondly, the accused admitted that he did communicate with Jho Low but said that these were very occasional. Elsewhere the accused tried to down play any such contact. Thirdly however the BBM messages (P578) between Jho Low and PW54 also as has been stated more than once, do reveal communication between the Jho Low and the accused on events which did occur (such as on the requests for Jho Low to assist clearance of his credit card purchases in Italy and Hawaii with AmBank). Interestingly, the defence submitted that evidence in P578 of this conversation is inadmissible because it is hearsay.

[2535]The ready and complete answer to this argument is that the contents of the BBM conversation between the accused and Jho Low referred to in exh P578 is admissible precisely because the accused has in cross-examination confirmed his said conversations with Jho Low. This is well recorded in the notes of proceedings dated 9 January 2020 — DW1:

> S: Alright. Look at the date 23rd December 2014, 14:10. Have you got it, sir? The first item. And I am just going to read to you and put it to you in context. This is the message starts:
>
> My Platinum card not going through Jho, can you call AmBank Visa and Mastercard right away. Thanks.
>
> From MNR: Please help as soon as possible. ASAP. Then Joanna says:
>
> Aiyoo.
>
> Then she says, our stupid card system down. Will check as soon as possible.

He is chasing. Yup call them.

Then it goes on: Urgent he is in Hawaii, he wants to charge USD 100 thousand.

System OK.

That's the Chinese very style of talking. They ask to try again and it goes on:

They check that the card works. They checked and dear it seems okay. Sure.

And then it goes on USD 1 transaction no problem. So they ask to try again. No problem. His limit is 3 million I think. Okay transaction cleared. Sure.

Then it says:

Yes card centre call and confirm the transaction cleared at their end.

You see that sir?

J: Yes, next page.

S: Yes, sorry it continues at the next page. And if you now look at your credit card statement. And from this conversation, and if you look at your credit card statement, 1796 of P587. Have you got that sir? You have to look at page 1796.

J: 1796.

S: Yes sir. As per this conversation, do you see 22nd December, Chanel, Honolulu, USD 130 thousand, Malaysian 466 thousand. You see that sir?

J: 466,330.

S: Yes but you can see the sum where you charged is written just below Chanel, USD 130 thousand? That's the conversion, correct sir?

J: Yes, I see that.

S: So all I was saying as per conversation, this transaction reflects the purchase at Chanel?

J: Yes.

...

S: ... It is a conversation, as you can see the last but three lines, 9th August 2014. Can you see that sir? It's a conversation between Joanna and Jho Low. Joanna is asking him:

Need to urgently verify.

Your Lordship has got that sir?

Need to urgently verify 24 transactions in Italy amounting to 3.3 million for jewellery from his credit card.

Then Jho Low informed Joanna:

From M. Great holiday here. All went well. Need you to speak to Cheah to clear Amvisa for 1.2 million euro for you know what purchase? Can you do it immediately.

And over the page sir and you look at page 20 sir, continue. Just now there was this M this qualified PM and it goes on. What we need to look at is just below, we come to the 11th August, at 8:36. Jho Low asked Joanna:

What's the amount on credit card that they charged? Or was it just block but not charge, total amount in Euro charged. Believe all went through. Need to check.

Then he says please check.

Then you just go down further after about six lines:

Let me know what cleared and what didn't.

Remember sir you had exceeded the credit limit. So let me know what cleared and what didn't.

Can we pay down the RM3million? Have to ask for summary.

And then there is a summary sir. Here, MasterCard for the RM2.8million as in your credit card. You recalled sir?

J: Yes.

[2536]In my view, the BBM conversation and messages contained therein (P578) are admissible because they were not disputed by the accused and PW54 who testified on P578 and that they were also tendered by the requisite certificate issued under s 90A(2) of the Evidence Act 1950 (P577). I should also add that P578 was tendered by the prosecution following the order of this court for disclosure under s 51 of the CPC, on the oral application of the defence during trial, early in the prosecution stage.

[2537]The question then is whether there were communications between Jho Low and the accused on matters pertaining to his accounts. Any denial by the accused is futile. For three main reasons.

[2538]First the accused admitted the three were involved in the management of his accounts. There is nothing improbable therefore about Jho Low communicating with the accused about the latter's accounts if he was one of those tasked with managing them for the accused. In fact, it is almost unnatural for Jho Low not to have communicated with the accused directly on them.

[2539]Secondly, the accused says that Jho Low was responsible more for the inward transfers of funds into accounts, the key of which was sourced from the alleged Arab Royalty donations. This must have been a very important role, for the spending by the accused would have to be dependent on availability of funds in the accounts in the first place. And there is nothing unusual if in the discharge of his duties, Jho Low had also communicated with the accused on issues concerning the accounts of the accused, including his credit card accounts.

[2540]Thirdly, as shown above, the accused did admit that the accused did have contact with Jho Low to ensure the accounts and credit card spending were cleared, albeit the accused testifying 'on very few occasions'.

[2541]As such, the various incidences of communication means that the knowledge on the part of the three on the balances of the accounts of the accused should inescapably be imputed to the accused, especially since the accused would be dependent on them to confirm on the availability of funds before because the latter would issue personal cheques from the same private accounts.

[2542]As shown in the evidence earlier, such denial that the accused had communicated with Jho Low as reflected in the BBM chats in P578 vis a vis issuances of cheques and credit card clearances in August 2014 (Italy transactions) and December 2014 (Hawaii) is devoid of merits.

[2543]The defence said the accused did not tell Jho Low to help him on 9 August 2014 that his credit cards were being declined because the credit card statement revealed that all transactions had gone through on 8 August 2014 and nothing was declined, and that the accused also testified that he was unaware of the credit card transaction as the purchase of jewellery at the 'De Grisogono' was done by his spouse.

[2544]This is erroneous since although the time difference resulted in the transaction date being reflected on 8 August 2014 in the credit card statement, the communication via WhatsApp recorded the request for assistance on 9 August 2014 Malaysian time whilst contemporaneously the date was 8 August 2014 in Italy. And because of the help that PW54 admitted to have extended in respect of the credit card purchase, the transactions were cleared. It is also disingenuous for the accused to deny he contacted Jho Low only because the card was used by his wife. It was his credit card. There was a problem which necessitated the accused getting in touch with Jho Low to quickly contact AmBank to clear the credit card purchase.

[2545]A similar explanation applies to the message that Jho Low sent to PW54 on 23 December 2014 stating that the accused was having trouble with purchases in Honolulu. The defence argued the credit card statement revealed only one transaction in Honolulu being done vide the Visa card on 22 December 2014 for RM466 thousand. There were no other transactions including on 23 December 2014 when the message was purportedly sent by Jho Low. The short response is again the difference in time zone across the globe. At the time of the purchase, which was recorded in the credit card statement at place of transaction, it was 22 December 2014. At around the

same time, it was already 23 December in Malaysia when Jho Low had the communication with PW54 on the credit card purchase problem just before transaction.

[2546]The defence meticulously set out instances where it alleged illustrated the propensity of Jho Low to lie and 'name drop'. Nevertheless, considering the circumstances established by other evidence, especially given his role as one of those who assisted the accused in managing his accounts, I do not, however, think that these instances of credit card purchases in Hawaii and Italy to have been fabricated, or that the accused did not actually contact Jho Low to get AmBank to assist.

Whether evidence of Ung Su Ling (PW49) is credible and admissible

[2547]The defence raises the argument, again, that the evidence from Ung Su Ling (PW49) should be discarded on the basis that it is not credible. There is little substance to this repeat argument. I should emphasise that in the first place even if a witness is an interested witness, the law is settled in that there is no legal presumption that an interested witness should not be believed. In this case, PW49 is entitled to credence unless reasons for disbelief can be proffered arising from evidence to the contrary and the surrounding circumstances (see *Public Prosecutor v Yap Boon Chang* [1992] 2 CLJ 1257; [1992] 3 CLJ Rep 454). In fact and law, a witness is also not disentitled from credence even if his status is of a convict who had served a term of imprisonment, unless there are valid reasons for disbelief (see *Public Prosecutor v Jowy Manjoro* [2007] 6 MLJ 342; [2004] 1 LNS 724).

[2548]Fundamentally, on the authority of the case-law on this subject, such as the Court of Appeal decision in *Sabarudin bin Non & Ors v Public Prosecutor* [2005] 4 MLJ 37; [2005] 1 CLJ 466, in undertaking its judicial duty to ascertain the reliability and credibility of the witnesses, the court should first determine whether there is any material contradiction in the evidence given by the witness; secondly, identify whether there is any material contradiction between that witness' evidence and that of other witnesses; and thirdly, test the entirety of the witness' evidence against the probabilities of the case.

[2549]In appreciating the evidence of a witness, the approach of the court is first to analyse whether the evidence of witness as a whole is reliable or has a ring of truth in it. If that impression passes muster, is formed, the court will scrutinise the evidence and consider any deficiencies or infirmities.

[2550]A finding that the witness gives a testimony which contains differences in material respects is a ground for making him an untruthful witness (see *Mohamed bin Kasdi v Public Prosecutor* [1969] 1 MLJ 135; [1968] 1 LNS 78).

A Nonetheless, discrepancies do not automatically make the whole of his evidence unacceptable (see *Seelan a/l Muthaven v Public Prosecutor* [2002] 3 MLJ 640). However, discrepancies on trivial matters which do not touch let alone interfere with the core of the case should be disregarded (see *Public Prosecutor v Nagathevan a/l Manoharan & Ors* [2009] 7 MLJ 464; [2008] 1 B LNS 615; [2009] 1 AMR 117 at p 240).

[2551]Having re-evaluated the matter in the context of the entirety of the evidence in this trial, I again find no reason to disbelieve the testimony of PW49. C

[2552]PW49 testified that she had received WhatsApp messages from Datuk Azlin informing her of funds being transferred into the accounts of IPSB. IPSB, as mentioned before, is a CSR project company which usually receive D funds from YR1M. The accused was then the Chairman of the Board of Trustees of YR1M, Datuk Azlin a member of the Board of Trustees and PW49 the foundation's CEO. As was found at the end of the prosecution's case, based on her testimony, PW49 said the messages from Datuk Azlin instructed her to transfer funds from IPSB into unknown bank accounts in AmBank whose E details were provided. Based on the instructions, PW49 informed Dato' Dr Shamsul (PW37) of IPSB to effect the transfers.

[2553]Her evidence is consistent with that of PW37 and PW54, as well as the documents detailing the flow of funds which originated from SRC, through F GMSB before arriving in IPSB. The transfers from IPSB to the accused's accounts too were after all executed and there were no complaints. The evidence of the accused also confirms that Datuk Azlin was one of the three who were tasked by the accused to ensure the sufficiency of funds in the G accounts of the accused.

[2554]At the same time, the defence is now contending that the instructions for the transfers from IPSB to the accounts of the accused were not from Datuk Azlin but Jho Low. Even if this were true, I do not however think this truly H matters for I emphasise that the accused himself has testified that he had tasked Jho Low and Datuk Azlin and Nik Faisal to ensure sufficient funds in his accounts so that all cheques issued by the accused would be honoured.

[2555]The testimony of PW49, the former CEO of YR1M is that for the I transactions that made up the transfers of the aggregate sum of the RM42m from IPSB into the two personal accounts of the accused, she relayed to Joanna Yu (PW54) the instructions on the said transfers, together with account details which she had received from Datuk Azlin.

[2556]The defence repeats the argument that the testimony of PW49 ought to be rejected because the contents of the WhatsApp messages that PW49 claimed to have received from Datuk Azlin on the said transfer of funds are inadmissible hearsay. As the matter in issue is not PW49's state of mind, the rule in the leading Privy Council decision in *Subramaniam v Public Prosecutor* [1956] MLJ 220; [1956] 1 LNS 115 does not apply. Even if the *Subramaniam* rule applies, this merely proves the factum of messages being received by PW49 from the late principal private secretary of the Prime Minister (the accused). In light of the other evidence, this is insufficient basis to infer that he was acting on instructions of the accused or with the accused's connivance.

[2557]It is trite that there is a distinction between the factum and the truth of a statement. As established by *Subramaniam v Public Prosecutor* [1956] MLJ 220; [1956] 1 LNS 115, it is not hearsay and admissible even if a witness testifies in court about what she heard from a third party who is not himself called as a witness when the object of the evidence is not the truth of the statement but the fact that it was made. The statement must also be directly relevant in considering the state of mind of the witness (see the decision of the former Federal Court in *Leong Hong Khie v Public Prosecutor* [1986] 2 MLJ 206; [1984] 1 LNS 172).

[2558]In the instant case, PW49 testified that she received instructions from Datuk Azlin about the transfers. She said she did not know the identity of the account holders receiving the funds. The purpose of admitting this evidence of the statement from Datuk Azlin is to show that it was made to PW49, not on the truth of the instructions. She testified that she followed the instructions. This thus related to her state of mind, which adhered to instructions made by Datuk Azlin.

[2559]Evidence in the form of money trail has in any event also shown that the instructions were executed by the banks involved. DW37 of IPSB and PW54 of AmBank private banking also confirmed to have communicated with DW49 for such purpose.

[2560]The question posed by the defence is to challenge whether PW49 had actually received such communication from Datuk Azlin. The defence submitted that it was Jho Low and not Datuk Azlin who conveyed the instructions to PW49.

[2561]The defence raised the improbability of her testimony that she had disposed of her mobile device which contained the said WhatsApp messages. I do not think this is incredulous. It is not unusual for hand phones be replaced fairly regularly especially with the advent of more advanced ICT. Nor can it be said PW49 could not have financially afforded to do that.

[2562]To the suggestion of the lead senior counsel that people would tend to preserve important evidence such as that stored in mobile devices and would not seek to destroy them, it is equally probable that the stored information in this case was not deemed by PW49 as critical or that she deliberately wanted to obliterate everything in her device for reasons best known to her.

[2563]Given the totality of the evidence, it is certainly far from improbable that it was indeed Datuk Azlin who relayed the instructions to PW49 on the transfers from IPSB to SRC. He was the principal private secretary to the Prime Minister. He was a member of the Board of Governor of YR1M where PW49 was the CEO at the same material period. The testimony of the accused too made it clear that Datuk Azlin was the key person with whom the accused would check if there were sufficient funds in his accounts before he decided to write fresh cheques.

[2564]After all, as has been analysed earlier, it is undeniable from the testimony of the accused himself that Datuk Azlin was one of the three that the accused named as being involved in the management of his personal accounts, the other two being Jho Low and Nik Faisal. There is nothing unusual about him instead of, for example, Jho Low conveying the transfer instructions to PW49.

[2565]As for the argument that even if was true that Datuk Azlin gave those instructions, this does not implicate the accused personally, again evidence strongly suggests the reverse. As mentioned, he was one of the three that the accused named as being involved in the management of his personal accounts. The accused did say that Datuk Azlin could have concealed transactions from the accused but could not offer any reasons why his principal private secretary whom the accused described as a man of integrity would have done that.

[2566]There is no evidence that Datuk Azlin had colluded with others such as Jho Low and Nik Faisal to defraud the accused. There is no evidence of him benefitting from any of the inward transactions which the accused then spent on, in the hundreds of millions in RM. Evidence has also shown, albeit in a different context, that the accused had instructed Datuk Azlin to personally hand deliver the SRC letter (P364) to the CEO of KWAP (PW38) signifying the accused's agreement to SRC's financing requests and had also contacted the Chairman of KWAP and the Secretary General of the Treasury (PW45) about the accused's position. This is not disputed by the accused.

[2567]The inference is inescapable. The instructions by Datuk Azlin to PW49 on the transfers of SRC funds from IPSB to Accounts 880 and 906 of the accused must have been done with the consent or connivance of the accused.

[2568]It remains established, and unrebutted by the defence, that the funds in question were transferred at the behest of the accused with the assistance of Nik Faisal or any one or more of the three and that in any event, the accused alone (and not any of the three) benefited from the RM42m credited into his own Accounts 880 and 906. I therefore agree with the contention of the prosecution that the transactions on the transfer of the funds of RM42m from SRC were the instructions of the accused himself to transfer the funds and that whether they were acted upon by any of Jho Low, Datuk Azlin or Nik Faisal did not make the slightest difference.

Whether evidence of lack of action by accused after being told of the inward remittances of the SRC's RM42m rebutted

[2569]The prima facie finding also relied on the evidence that in the middle of 2015, after the allegations went public, PW37 of IPSB and PW49 of YR1M had separately met with the accused to explain about the transfer of the funds from IPSB into the two accounts of the accused. Despite expressing apparent shock and anger, the accused did not ask either PW37 or PW49 to lodge any police reports. Neither did the accused himself lodge one, or made any inquiries to ascertain the truth or rectify any errors, a conduct which I held was not at all usual given the circumstances, especially considering the status of the accused then as the Prime Minister and the minister in charge of the nation's finances.

[2570]The testimony of the accused confirmed that he met with PW37 right after the latter was released from remand by the MACC sometime in July 2015. PW37's remand was in relation to investigations on the RM42M transactions by the MACC. PW37 informed the accused that the transactions as reported in *Sarawak Report* (D771) were true based on matters told to him by the MACC. PW37 said that he had been told to carry out the transfers from IPSB by PW49 and Dennis See without knowing that the accounts belonged to the accused.

[2571]The accused expressed shock and disappointment and told PW37 that he had no knowledge of the matter. PW37 eventually apologised to the accused. Not long after that, PW49 met with the accused and informed him that she was instructed on the IPSB transfers by Datuk Azlin and she too did not know that transferee accounts belonged to the accused.

[2572]The explanation proffered by the accused for not lodging a police report after meeting with PW37 and PW49 in mid-2015 was that investigations into the RM42m transactions had already been commenced by the MACC and the Joint Task Force comprising the AGC, MACC, BNM and the PDRM as a result of matters being published by the *Sarawak Report* (D771) and The Wall Street Journal (D772) on 2 July 2015. He met PW37 and PW49 only after the

investigations by these agencies had commenced and were afoot.

[2573]Further, as investigations were on-going, the accused did not lodge a police report or make a public statement or take any action so as not to be perceived as interfering or attempting to interfere with the investigations. In any event, as the investigations were already looking into the matter, the accused knew that he would be asked to provide a statement which was eventually recorded from him by the MACC in December 2015. The accused said that given that he had no knowledge or involvement in the matter, he was not perturbed as he believed the truth would prevail.

[2574]As I have discussed and found earlier, the fact that a serving Prime Minister chose not to immediately take action to clarify, let alone make any police report when confronted with mounting allegations of criminal and financial improprieties especially when directly conveyed by PW37 and PW49 was entirely repugnant to a conduct reasonably expected of a Prime Minister who had nothing to hide.

[2575]A mere lodging of a police report, detailing one's version of the story, if not expressing outright denials and identifying the real culprits, is surely not interfering with investigation. It instead assists the investigation process. It was in fact incumbent upon the accused to have done exactly just that to demonstrate cooperation with the authorities, especially since he knew that MACC and the Joint Task Force had commenced investigations into the matter where the principal suspect was the accused. One who is falsely accused would naturally want to lodge a police report as a matter of urgency, what more if one is the Prime Minister of the country, given that the matter would have been of a public interest of extreme importance.

[2576]The contention that the accused did not lodge a police report or make a public statement or take any action so as not to be perceived as interfering or attempting to interfere with the investigations is specious. It is not as simple as the assertion that the entire purpose of anyone lodging a police report is to cause investigations to be commenced in relation to matters complained of. Here, the accused was the target of the accusations. He was the Prime Minister. It was a matter of public importance.

[2577]After all, there is a world of difference between making a police report and giving a statement to the authorities. The fact that the accused did not make such report in the circumstances of this case gives rise to the inference that he was not prepared to lodge a report, in order to give him more time to prepare for a formal statement to be recorded by the authorities.

[2578]Even if the accused was, however unjustified, averse to making a police report, the accused could have also taken other steps to clarify and clear his name. Such as issuing a public denial of any involvement or instituting legal action against those whom he thought had wronged him. None of these happened. Nor did he tell PW37 and PW49 to lodge police reports.

[2579]In truth, it was not that the accused did not take action because he was not perturbed as he believed the truth would prevail. On the evidence, the inference is he could not in the second half of 2015 provide any explanation publicly or to the authorities (the police and MACC) to show his non-involvement given his complicity in the crime. This is thus wholly consistent with the inference of the presence of his own knowledge of the transfer of the RM42m into his personal accounts at the material time. It must be added that the accused must have been emboldened to have taken this course of action of maintaining an 'elegant silence' because in the same month of July 2015 when the reports of the allegations against him went public and formal investigations instituted by MACC, also saw the appointment of a new Attorney General on 27 July 2015, as stated earlier.

Whether other contemporaneous events support the position of the accused?

[2580]The defence also argued that the conduct of the accused in relation to the investigations which were on-going is corroborated by the contents of two press statements published on 3 August 2015 (D805) and 5 August 2015 (D806) by the MACC on matters concerning the on-going investigations into the RM2.6 billion deposit and the SRC case.

[2581]In the first press statement of 3 August 2015 (D805), the MACC, inter alia, noted:

(a) the MACC had been investigating into RM2.6 billion matter and the SRC case, whilst PDRM (RMP) was investigating into matters related to 1MDB, and that BNM was investigating matters relating to financial procedures and regulations;

(b) the results of the investigations on the RM2.6 billion case had been informed to the attorney general and the findings made were that the RM2.6 billion which was channelled into the account of the accused was from donations and not from 1MDB;

(c) MACC's investigations into the SRC matter involving funds of RM4 billion was still ongoing; and

(d) MACC assures that the investigations would be conducted in a fair, just and professional manner.

[2582]In the subsequent statement of 5 August 2015 (D806), the MACC, inter alia, further noted and clarified:

(a) investigations into the RM2.6 billion and the SRC matter were still ongoing and not concluded or ceased;

(b) explanation on the existence of donations being made to the accused were received by the MACC from the donor whose identities were ascertained by the MACC from documents obtained from AmBank which revealed that four letters were given to the bank when substantial sums had been remitted into the accounts of the accused. These documents reflect that the RM2.6 billion were donations;

(c) the MACC had obtained explanations from the donor from the Middle east and the party has verified the provision of the donation;

(d) the MACC made it known that the accused DSN would be asked to provide his explanations on the donations received by him to the MACC; and

(e) MACC would continue to conduct the investigations in an independent, just and professional manner without 'fear or favour'.

[2583]The defence also added that the accused's explanations vis a vis the ambit of the then pending investigations and reliance on MACC's press statements on 3 August 2015 (D805) and 5 August 2015 (D806) in not wanting to do anything to affect the integrity of the investigation which he said he would fully cooperate in was contemporaneously recorded in the pleadings filed by the accused in the defamation suit brought against Tun Ling Liong Sik in October 2015.

[2584]Thus, in the reply and defence to counterclaim dated 12 January 2016, the pleadings contained statements acknowledging that the said MACC's press statements in D804 and in D805 confirmed that the MACC was investigating into the issue of the RM42m but nevertheless have confirmed verification of the donations being made to him. In addition, the accused stated he would reserve the right to respond to the RM42m because investigations are still on-going as the accused respects the integrity of on-going investigations, and that he would give his full cooperation to the investigations. The accused also denied allegations of any misconduct or receiving monies wrongly, and that pending completion of the investigation, the accused would refrain from issuing any public statement so as not to affect the investigations.

[2585]Moreover, the defence contended that the prompt commencement of a suit for defamation by the accused to challenge allegations of his involvement in misappropriation of public funds was conduct consistent with DSN's innocence and state of knowledge.

[2586]I think the point lost on the defence is that it is reasonably to be expected that one who is falsely accused would take *immediate* steps to clear his name, more so if the name is that of the most powerful political figure in the country. In this case, the accused had taken comfort ex post facto of the MACC's press releases of early August 2015 (which seemed to assist his position) when the accused started only in October 2015 making statements on the SRC matter albeit in cause papers involved in the defamation suit.

Whether the accused's averment in defamation suit meant he knew about the RM42m from SRC

[2587]I have, as discussed earlier, also referred to the accused's averment in his own affidavit dated 12 January 2016 (P616) where he admitted clearly that he knew that the RM42m that was transferred into his personal accounts came from SRC, and only that he did not know it came through two intermediaries, GMSB and IPSB.

[2588]In his testimony, the accused said that the said 'admission' in P616 was not correct and was in fact taken out of context. He stated that a reading of the said P616 affidavit in the context of cause papers as a whole would reveal that, at the material time of the transactions, the accused had no knowledge of the same or that the RM42m was from SRC's account.

[2589]And that the cause papers would reflect that the accused only came to find out about the RM42m being transacted into his accounts from SRC later in 2015. It is submitted that P616 in the context of the cause papers does not provide a basis to impute knowledge on the accused on the source of the RM42m being from SRC as at the time of the transactions in December 2014 and February 2015.

[2590]However, a close scrutiny of the cause papers will not disclose any pleadings or averments that the accused did not at the time of the transaction know that RM42m from SRC had entered his personal accounts. And significantly the averments relied on to show knowledge on his part, as contained in P616 does not contain any qualification in support of the defence's interpretation of what the averment actually meant.

[2591]This is readily plain from the cross-examination of the accused on this issue as in the notes of proceedings dated 7 January 2020 — DW1:

> S: This is the assertion the assertion made by Tun Ling. Now I'll refer you to your affidavit which is P616. And the first few pages are the Bahasa version and the translation is found thereafter. This is Plaintiff's Affidavit in Reply. Can you see that sir? The English version behind the Bahasa version?

J: Yes, para 6.

...

S: Dato' Sri, you agree that you made this averment or this statement?

J: Yes.

...

S: Yes, you signed this one. And thus, the contents of paragraph 6 of P616 represent the truth or you got any qualification?

J: Sepertimana saya kata disini, dia masuk dalam akaun saya tetapi tidak dengan pengetahuan saya pada ketika itu, bahawa itu adalah duit SRC. That is the

S: No, I want to know whether there is any qualification? You are just reading. That we can read.

J: Yes.

S: Apart from this, is there any qualification?

J: I am stating it so that it's very clear that the RM42million, at that time, I didn't know it was SRC's money because it went, came in via intermediaries, okay. So I had no knowledge of it. I had no knowledge what it means that I had no knowledge that it was SRC's money at that material time.

S: I am putting it to you Dato' Sri that paragraph 6, you have admitted that RM42 million originated from SRC and entered your account. Is that correct? First?

J: At that material time, I did not know it was SRC's money. At that material time, I did not know it was SRC's money.

S: I am putting it to you, the affidavit here means at the time you affirmed the affidavit, you knew 42 million originated, the source of the money was from SRC which entered your account. Correct or not sir?

J: No, I only knew later but not at the material time.

S: I am putting it to you that you knew it at that material time?

J: No, no. Absolutely not.

[2592]However, the accused's denial is inconsistent with his own averment in P616. And nothing in the cause papers for the defamation suit contains any qualification to reflect what he now claims what he meant in making the averments.

[2593]I reproduce hereunder the relevant averment. This is contained in the application to strike out the defence of qualified privilege used by Tun Ling Liong Sik in the defamation suit filed by the accused, where the accused affirmed on oath an affidavit (P616A) in the following clear terms:

> Paragraph 8 of the Defendant's Affidavit in Reply is admitted in so far as in my Reply and Defence to Counterclaim, I have admitted that the USD700 million did enter my account as a personal donation and the 42 million which originated from SRC entered my account without knowing that it was channelled via two (2) intermediaries. Paragraph 6 of the Plaintiff's Affidavit in Support is reiterated and adopted.

Whether evidence of lack of complaints against AmBank rebutted?

[2594]In finding that the prosecution had established a prima facie case against the accused, I have referred to the evidence of the AmBank JRC branch manager (PW21), the relationship manager in the private banking department (PW54) as well as the credit card management manager (PW47) which was unequivocally unanimous in testifying that the accused had never inquired or complained about the numerous and large transactions in and out of his three personal accounts, let alone lodge any police report or filed any legal suits on any irregularities in his accounts.

[2595]Again, the accused reasoned that as there was evidence that the investigations into the matters were already afoot at the material time, he would wait for the investigations to be completed, and not take any action on the unauthorised transactions and irregularities in his accounts. In his words, as recorded in the DW1's witness statement tendered in court (PSSB1) on 3 December 2019:

> Saya tidak mempunyai sebarang pengetahuan berkenaan dengan transaksi tanpa kebenaran dan urusan-urusan sehingga waktu AGC menerbitkan kenyataan media tersebut. Selepas itu saya tidak berfikir ianya perlu untuk membuat saman sivil atau menyiasat perkara tersebut dengan lebih lanjut memandangkan saya sangat gembira membiarkan perkara itu. Saya juga tidak diberitahu bahawa Ambank telah didenda oleh BNM. Saya hanya mendapat tahu butiran sebenar berkenaan dengan urusan tanpa kebenaran pada akaun saya apabila bukti dibentangkan semasa Perbicaraan. Sebagaimana yang saya sebutkan di atas sewaktu keterangan saya diambil oleh MACC saya tidak pernah diberitahu akan beberapa percanggahan di dalam dokumen.

[2596]The defence argued that as the findings of the attorney general (D780) did not allude to the irregularities in the transactions and merely concluded that the accused had no involvement or knowledge in the same, there was no reason to thereafter inquire into matters as the Attorney General himself had found the accused not culpable.

[2597]I do not think this is a satisfactory stance to take. The allegations against the accused were wide-ranging. The attorney general's findings primarily addressed the issue of the mental element of the accused which was found, then, to have been unproven.

[2598]But the stark fact remains that huge sums of monies did get remitted into the personal bank accounts of the accused. The decision of the accused not to pursue any civil action or even raise a complaint against the bank or other parties, vis a vis irregularities in his accounts despite the clearance of the attorney general had actually raised more questions on the exact role of the Prime Minister in these transactions.

[2599]The accused was never told of the results of the investigations. BNM had also found that AmBank had breached its reporting obligations in relation to the transactions involving his personal accounts, as a result of which, AmBank was fined. The accused said he was thus unaware of the exact transactions and the irregularities in the account and ultimately discrepancies in the accounts, the exact transactions and the alleged manipulations by third parties were only revealed completely in these proceedings after evidence of the BBM chat messages (P578) was produced and eventually admitted to by PW54.

[2600]I would say that for precisely these reasons, the accused should have been more insistent on finding out the truth. The issues on who was responsible for the entry of the SRC funds into his personal accounts should be transparently addressed. As the defence correctly submitted, these were not dealt with in the findings of the attorney general. But these are important to dispel any further suspicion on the involvement of the accused. The accused, however, conveniently chose not to raise any complaints.

Whether the non-return of the RM42m to SRC further weakens the defence of the accused

[2601]Further, not only did the accused fail take any action ordinarily and reasonably expected of someone in his position and standing, to clear his name and lodge reports with the authorities, when confronted with serious allegations of financial wrongdoings, after being informed of the movements of SRC funds into his accounts by PW37 and PW49, as discussed earlier. But that it has also been established from the accused's own evidence that neither did he take any steps to return the RM42m to SRC.

[2602]The accused did not therefore take the logical step of returning the RM42m to SRC after being informed about it by PW37 and PW49. Earlier, at the end of the prosecution's case I found that among other evidence, the accused's failure to take any immediate action to inquire or clear his name fortifies the case of the prosecution that he must have known about the transfers of the RM42m into his personal accounts at the material time. That was mentioned earlier.

[2603]But in cross-examination, the prosecution asked the accused about the non-return of the RM42m to SRC and despite repeated questioning, he maintained he did not return the same because investigations were pending. This is unconvincing since given the doubts, he should have at least offered to set RM42m aside for a possible return to SRC or as the authorities might determine. That did not happen. In the notes of proceedings on 23 January 2020 — DW1:

> S: Sorry, I have to ask you this but only for completeness. So, even in July, after Ung Su Ling and Dr Shamsul told you this funds are from SRC, they have learnt in the investigation, you still kept the funds to yourself without returning them, which you should have immediately sir. You agree or disagree?
>
> J: I disagree because it was subject to investigation at that time.
>
> S: Even if it is subject to investigation sir, did you volunteer to return the funds to SRC? No one is going to stop you from returning the funds sir. How is this an excuse?
>
> J: It's not an excuse.
>
> S: Yes. You agree you did not attempt to return the funds to SRC sir? There's no evidence of that. You agree?
>
> J: That I agree.

[2604]I must stress that by then the accused was told that the funds were SRC's. At that stage, even if one were to believe the accused's story that he thought the funds in his accounts came from the Arab donations, after being told that it originated from SRC, the accused could no longer maintain that it came from the Arab donations. He ought therefore to have stated his intention to return the RM42m to SRC. It is worthy of emphasis that as the Finance Minister he was the MOF Inc, the legal owner of SRC. His failure to articulate an intention to repay the same, let alone actually returning the RM42m, is difficult to countenance.

[2605]More significantly, even after the attorney general (DW14) had exonerated the accused of any criminal wrongdoings on 26 January 2016, he still did not return the RM42m to SRC. Worse, notwithstanding that the statement of the attorney general, the fact remains that funds of SRC to the total sum of RM42m had gone into his accounts and that he had spent the same for purposes related to his own advantage and benefit. The attorney general did not say that the RM42m was the accused's own monies. The former had taken the position that the latter believed that the RM42m came from the alleged Arab donations, and that he had no knowledge it came from SRC. But still, the accused has not returned the same to SRC.

A **[2606]**The reaction demonstrated by the accused, who was discovered to have utilised funds belonging to a government linked entity credited into his personal accounts is extremely at absolute variance with the conduct reasonably expected of a serving Prime Minister and Finance Minister of the country then, of taking immediate steps to claim innocence and clear his name and protect
B the dignity of the highest executive office in the land.

[2607]At the same time, no action was ever taken by SRC to recover its RM42m. It cannot be emphasised enough that the accused as the Finance Minister and MOF Incorporated was also the sole legal owner of SRC.
C Doubtless, this also manifests the dominant control of the accused over SRC at the material time, even subsequent to the discovery of the matter, until his loss of office as the Prime Minister and Finance Minister.

D Whether element of misappropriation rebutted

[2608]In any event, the failure of the accused to account for the funds, other that the false belief of personal donation from King Abdullah, is the proof of the dishonest intention. As I have discussed at the end of the prosecution's case,
E in *Sathiadas v Public Prosecutor*, Raja Azlan Shah J (as HRH then was) stated that an offence of CBT is completed once it is established that monies had been entrusted for a particular purpose but was not used for that purpose, and a failure to explain or the inability to account for the said monies or acts would prove one's dishonest intent.

F

[2609]The CBT relying on the mode of misappropriation does not have to be proven by the utilisation itself. In fact, utilisation is unnecessary to prove misappropriation or the actus reus of the offence. The fact that the accused as
G a director of the company (within the meaning of s 402A of the Penal Code) has intended a wrongful gain to himself and thereby caused a wrongful loss to SRC, fulfils the element of dishonesty and completes both the actus reus and the mens rea of committing the offence of CBT under s 409 of the Penal Code as framed in the three charges.

H

[2610]Nevertheless, evidence of utilisation, however, may still be relevant, such as to the determination of whether there was dishonest intention and is a pre-requisite if the mode of committing CBT is conversion for own use, which has also been established in the instant case.

I

[2611]And it would be remiss of me not to refer again to the decision of the Federal Court in *Navaratnam v Public Prosecutor* [1973] 1 MLJ 154; [1972] 1 LNS 100 which in plain fashion held the following:

> On the question of dishonest intention, we can do no better than quote a passage

from the judgment of Fazl Ali J in *Harakrishna Mahatab v Emperor.* We do so because the learned trial judge in the instant case has referred to it as having been cited with approval by Ismail Khan J (as he then was) in the case of *Mohamed Adil v Public Prosecutor*. Fazl Ali J said:

> *It is not necessary or possible in every case of criminal breach of trust to prove in what precise manner the money was spent or appropriated by the accused, because under the law even temporary retention is an offence provided that it is dishonest*; but the essential thing to be proved in case of criminal breach of trust is whether the accused was actuated by dishonest intention or not. As the question of intention is not a matter of direct proof, the courts have from time to time laid down certain broad tests which would generally afford useful guidance in deciding whether in a particular case the accused had or had not mens rea for the crime ... (Emphasis added.)

[2612]The defence has not negated the version on the manner the misappropriation in relation to the transfers of the RM42m from SRC to Account 880 and Account 906 was undertaken, given the evidence, among others of the involvement of Nik Faisal and Datuk Azlin, which also principally featured PW42, PW37 and PW49.

[2613]The defence's argument on the utilisation of the RM10m transferred into Account 880 on 10 February 2015 is no less misconceived.

[2614]It argues the factum of this utilisation does not establish the physical act of the CBT charges since the offence must be considered complete on 6 February 2015 which was when the funds were transacted out of SRC. The utilisation of the RM10m post the material date cannot establish the ingredient of misappropriation.

[2615]This is plainly erroneous because the defence is confusing utilisation with misappropriation. Utilisation need not happen at the same time as misappropriation. Often it is a subsequent event. The establishment of the element of misappropriation does not usually require evidence of any utilisation of the funds said to have been misappropriated. The utilisation is however, relevant to the fact in issue because it is evidence of a subsequent conduct of the accused following the misappropriation. In this context of CBT charges, utilisation is relevant, for example, to the element of dishonest intention.

[2616]The Kerala High Court decision in *The State of Kerala v Joseph Anthony Anthony (26th November 2005)* does not advance the case of the defence.

[2617]In that case, as summarised by the defence, funds from a society were appropriated by the Secretary and others and some of these funds were

transferred into the account belonging to the petitioner. The trial court held that the mere fact that the petitioner was a beneficiary of the misappropriation by others was not sufficient to charge the petitioner with CBT. There was no evidence of the petitioner's involvement in the transactions and therefore the petitioner could not be said to have committed CBT over funds of the Society. The prosecution sought a revision over the trial court's ruling. The High Court dismissed the revision and held:

> Just because the third accused had derived some benefits or received some money from the others from out of the amount misappropriated by the others, he cannot be prosecuted either under the provisions of the Indian Penal Code or under the Prevention of Corruption Act. For a definite prosecution against him, there must be some material to show that he received such benefit as ... part of a conspiracy hatched by him and others to misappropriate money from public funds. The prosecution records would not show how exactly the first respondent in this proceedings was benefited by the act of offence allegedly committed by the others. Of course, as regards the others including the office bearers of the society, the prosecution has produced some materials. The first respondent being not a conscious party to the alleged misappropriation, or an office bearer or member of the society, there must be some definite material when he is being prosecuted along with the others who allegedly committed misappropriation. In the absence of any definite allegation against him that he derived benefits or received money from the others as part of a conspiracy, or that he had in any manner helped or facilitated the commission of offence by them, a prosecution against him is not possible at all.

[2618]This case stands for the proposition that the mere fact that a person is a beneficiary of the misappropriation of funds committed by others was not sufficient to charge the person with CBT where there is no evidence of his involvement in the transactions. This is a valid proposition.

[2619]But the defence tried to say that the accused was exactly in this position. However, as evidence has more than amply shown, inference of his involvement in the misappropriation, is premised on among others, the role played by the mandate holder of his own personal accounts (in respect of the transfers out of SRC into GMSB and subsequently into IPSB), and his own principal private secretary (in relation to the transfers from IPSB into the Accounts 880 and 906 of the accused), is nothing less than compelling. The two were also, as testified by the accused, responsible in the management of the accused's personal accounts, especially in ensuring sufficiency of funds in the accounts for the accused to be able to continue writing cheques.

Whether the element of dishonest intention rebutted

[2620]Allegation that the transfers of RM42m was for Jho Low's own purpose and benefit is irrelevant if not misconceived. Jho Low is not an accused in this trial in this court. After all, actions taken by Jho Low was to ensure sufficiency

of funds in the personal accounts of the accused, for the utilisation of the accused. And I must reiterate this key evidence that this was the task entrusted to Jho Low, Dato' Azlin and Nik Faisal by the accused as confirmed in the testimony of the accused himself.

[2621]In the discharge of the duties entrusted on them, the overriding inference must be that the accused was in communication with them. Indeed, the accused himself admitted this, although he tried to qualify that vis a vis Jho Low by saying these were only for very few occasions. After all, Datuk Azlin worked as his principal private secretary the PMO, and Nik Faisal was CEO and Director of SRC who was the Board's link with the accused, as well as his appointed mandate holder for the personal accounts of the accused.

[2622]That apart, the BBM conversations (P578) between Jho Low and PW54 also confirmed the contacts made between Jho Low and the accused. In any event, the accused himself testified that Jho Low was the conduit for the alleged Arab donations. He was the one whom the accused said informed the accused about the purported wish of the late King Abdullah to make personal donations to the accused. The accused said he was impressed with what Jho Low had achieved, including being able to first break the news of the intention of the late Saudi monarch to bestow the order of merit award to the accused and his ability to arrange meetings for the accused to meet the King. It would have been extremely unlikely for the accused not to have a regularity of contacts with Jho Low beyond merely on very few occasions.

[2623]This evidence of communication necessarily under such circumstances gives rise to the inference of knowledge on the part of the accused that the RM42m that flowed into his accounts on 26 December 2014 and 10 February 2015 came from SRC.

[2624]The findings at the end of the prosecution's case is that the transfers from SRC to GMSB and from GMSB to IPSB were effected by Nik Faisal and PW42, then the directors of the company. Nik Faisal was also the mandate holder for the accused's personal bank accounts. The accused also at the same time had an overarching control of SRC. There is also other evidence that no less strongly give rise to the inference of knowledge and dishonest intention on the part of the accused.

[2625]I have listed several reasons for the finding of the knowledge and dishonest intention on the part of the accused in relation to the commission of the CBT offences as charged.

[2626]In short and at the risk of repetition, these include first, his own averment in his affidavit professing knowledge of his receipt of the RM42m

A from SRC, secondly the absence of any complaints made to the bank on any unauthorised transactions in any of his accounts, including his credit cards accounts during the relevant period and thereafter, as confirmed by PW21, PW47 and PW54, as well as DW2 from AmBank, thirdly, the involvement of Nik Faisal, who was also his own mandate holder for his accounts and Datuk B Azlin, the accused's principal private secretary in the transfers of the RM42m from SRC to Accounts 880 and 906 through GMSB and IPSB, fourthly, the accused's own instructions to the bank for the transfer of RM32m to PBSB and PPC (P277), fifthly, the many BBM messages between PW54 and Jho Low which demonstrate knowledge on the part of the accused concerning the status C and transactions involving his personal accounts, sixthly, the swift utilisation of the RM42m, seventhly, the overarching control of the accused over SRC and the finding he was a Director (under s 402A of the Penal Code) entrusted with dominion over the property of the company, and eighthly, the absence of any D action to clear his name or lodge report with the authorities upon being notified of his use of SRC funds by PW37 and PW49.

[2627]The evidence of the accused at the defence stage further confirms the role of Jho Low, Datuk Azlin and Nik Faisal in the management of the personal E accounts of the accused. And I have also found that the key defence of the accused that he honestly believed that the foreign remittances into his accounts in 2011, 2012, 2013 and 2014 pursuant to the four Arab letters (D601–D604) were the personal donations from King Abdullah to be contrived and a fabrication. Even if it were true, for the relevant period towards the end of F 2014, coinciding with the period of the specific dates of the receipt of the funds in the charges against him, it had been established that the accused had utilised monies in his accounts for far in excess of the available funds, including the alleged Arab donation that arrived in his accounts during that period which the accused knew was only about RM49m.

G

[2628]And nor can it be denied that the accused had spent on the relevant RM42m and more. Much more. It is generally easier to infer dishonesty where there has been conversion or utilisation, like in this case, and not merely H appropriation.

[2629]The further analysis on the defence of the accused having the honest belief that the funds came from King Abdullah has also resulted in a clear finding that the accused could not have held such belief.

I

[2630]Whatever the allegation about the financial improprieties by Jho Low concerning SRC, it is undeniable that the RM42m from SRC did end up in the personal bank accounts of the accused and the accused knowingly utilised the funds for his own benefit.

[2631]Given the task of ensuring sufficiency of funds to enable the accused to issue cheques, as entrusted to Jho Low, Nik Faisal and Datuk Azlin, there must have been communication with them on the balances and sources of funds, despite the denial of the accused. Evidence has in any event also shown existence of communication between the accused and Jho Low, given the accused's own admission, the BBM messages and as supported by the testimony of DW8. And after all, Nik Faisal was the mandate holder for the accused's own accounts and Datuk Azlin was his own principal private secretary. On top of that, the weight of evidence of the accused's knowledge and dishonest intention established at the end of the prosecution's case as listed earlier remains unrebutted.

[2632]The accused was aware that in reliance of his purported belief of the Arab donation, he only had RM49m between June and December 2014. As shown earlier, the bulk of this amount was utilised by the accused even before the arrival from SRC of the RM42m, with the first RM32m credited on 26 December 2014. There is no basis for the accused to assert that his use of the RM42m from SRC (which came later in the period) was on the belief that it was part of the RM49m of the alleged Arab donation because he had already used up the larger part of the RM49m before the arrival of the RM42m. And yet the accused also fully utilised the RM42m from SRC.

[2633]In total, he utilised during that later period in 2014 and early 2015 some RM136m despite alleging his belief that RM49m came from the fourth tranche of the Arab donation pursuant to fourth 'Arab letter' (D604). As such, his explanation that he had no knowledge of this RM42m from SRC is devoid of credibility. It is too far-fetched and wholly unsubstantiated for a Prime Minister and Finance Minister of the country to have continued to spend more and more money than he knew he had but claimed that he had no knowledge of the excess fund he spent on.

[2634]In any event, I have also earlier found that the defence of the accused that he had honestly believed that the said RM42m was part of the series of remittances in the form of personal donations to the accused from the Arab Royalty to be a fallacy. The accused did not genuinely hold that belief as the entire narration on the donation from King Abdullah is a fabrication. As such, the accused could not have honestly believed that the RM49m in relation to the purported fourth letter (D604) was from King Abdullah. This absolutely demolishes his contention that the RM42m (from SRC) was believed by him to be another series of donation from King Abdullah.

[2635]As the defence of absence of knowledge of account balances and the defence of belief of Arab donation have been demonstrated to be contrived, this

inescapably means that the evidence of dishonest intention of the accused, of causing a wrongful loss to SRC and a wrongful gain to himself, as a director under s 402A of the Penal Code entrusted with dominion over the property of SRC, in the commission of misappropriation and conversion of the RM42m from SRC is firmly established and proved beyond a reasonable doubt.

[2636]Even if wrongful gain or wrongful loss is merely temporary, case law authorities have made it clear that dishonest intention is still established. In the decision of the Federal Court in *Tan Sri Tan Hian Tsin v Public Prosecutor* [1979] 1 MLJ 73; [1978] 1 LNS 199, Chang Min Tat FJ had stated as follows:

> On the question of the purport of the letter to the accused, it was tendered by the defence as evidence of the debt and the demand for repayment, but, strangely, not as authorisation to keep the money. The accused would appear to have completely misread the letter for its full effect. On the other hand, this letter was of course at variance with at least two of Zee's letters, those of May 17, 1974 wherein Zee promised to forward the details and vouchers for the claim.
>
> Even on the strength of these latter letters and the allegation that the accused had retained the money from June 24 to July 24, 1974, the accused had committed criminal misappropriation of the money. *To refine the case of the clerk who dips his hands into the firm's till somewhat, if he is in possession of the firm's money with a duty to bank it or to pay it over to a particular person in discharge of the firm's debt to this person and he only does so after using it for his own purpose for however short a period of time, he is guilty of misappropriation*. (Emphasis added.)

[2637]A similar finding was arrived at by the Federal Court in the decision in *Datuk Haji Harun bin Haji Idris & Ors v Public Prosecutor* [1978] 1 MLJ 240; [1977] 1 LNS 24 where Wan Suleiman FJ instructively observed as follows:

> It was not disputed that the shares had been entrusted by the bank to the second appellant *and the learned judge found on the evidence that he had dishonestly misappropriated them, albeit with the intention of doing so but temporarily*, and that despite this the second appellant was guilty because the shares had been pledged without authority from the bank and to benefit an outside body, and we are of the opinion that in the circumstances the learned judge could not reasonably have come to any other finding. (Emphasis added.)

[2638]In the case now before me, it was far from temporary. For the accused had utilised the entire RM42m from SRC. The only true inference to be drawn which is compatible with the probability of the case and in congruence with the totality of the evidence at the end of the case is that the accused had knowledge of the funds when he received them and knew so when he utilised them. That is dishonesty, pure and simple.

[2639]The defence also raised the argument that the ingredient of dishonesty turns on evidence on which it may be inferred that the accused was aware of the proprietary rights attached to the impugned property and chose to disregard the same.

[2640]I do not disagree.

[2641]As stated earlier, the element of 'dishonestly' is defined in s 24 of the Penal Code as follows:

> Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, irrespective of whether the act causes actual wrongful loss or gain, is said to do the thing dishonestly.

[2642]The defence also correctly makes reference to the case of *Rex v Lim Soon Gong and two others* [1939] 1 MLJ 10; [1938] 1 LNS 86 which held as follows:

> The essence of dishonesty is intention. 'Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person is said to do that thing 'dishonestly.' Section 24. 'Wrongful gain' is gain by unlawful means of property to which the person gaining it is not legally entitled. 'Wrongful loss' is loss by unlawful means of property to which the person losing it is legally entitled.' To be dishonest a person must intend to gain by unlawful means property to which he is not legally entitled, or he must intend to cause loss by unlawful means of property to which the loser is legally entitled.

[2643]The element of dishonesty is not based on the existence of actual wrongful loss being occasioned or actual wrongful gain being made. That is already stated in s 24. This is also observed in the case of *Sathiadas v Public Prosecutor* [1970] 2 MLJ 241; [1970] 1 LNS 142, as the following passage, referred to earlier, clearly demonstrates:

> Criminal breach of trust is not an offence which counts as one of its factors, the loss that is the consequence of the act, it is the act itself, which in law, amounts to an offence. The offence is complete when there is dishonest misappropriation or conversion to one's own use, or when there is dishonest user in violation of a direction, express or implied, relating to the mode in which the trust is to be discharged.

[2644]In the leading case on this subject in *Periasamy s/o Sinnappan & Anor v Public Prosecutor* [1996] 2 MLJ 557; [1996] 3 CLJ 187 it was also held thus:

> To demonstrate the error into which the learned appellate judge fell, it suffices to quote the following passage from *Nelson's Penal Code* (7th Ed) at p 1529:
>
> > No criminal breach of trust if action of the accused is in good faith

> A person, who is pleading a claim or right, may be acting without dishonest intention if he is asserting bona fide what he believes to be a lawful claim even though it may be unfounded in law or in fact. If the accused has some claim to the property over which he still retains dominion, there would be no offence unless the claim is merely a pretence, and not bona fide, even if it turns out to be unsustainable in law.
>
> Although this passage is in the context of alleged dishonest misappropriation, we see no difference in principle when the proposition is applied to a case of alleged dishonest use or disposal. A person may dispose of another's property under an honest belief that he is entitled to do so. If it later transpires that he lacked the authority he believed he had, he will not be guilty of criminal breach of trust.

[2645]The logic of the defence's argument is that since the accused held a reasonable belief that funds in his accounts in 2014 and 2015 were from Arab donations being remitted in 2014 as intimated by Jho Low and as evidenced in D604, such that the accused did not thus have knowledge of the RM42m or that the RM42m was from SRC, these inferences are inconsistent with the existence of the ingredient of 'dishonesty' because it cannot be said the accused was aware of the actual provenance of the RM42m and disregarded the same in order to gain unlawfully.

[2646]In other words, if the accused believed that the funds in the accounts at the material time were from Arab donations it must also mean that the accused held the view that he was legally entitled to deal with the same, negating any finding that he intended to gain unlawfully from the said funds.

[2647]This argument is meritorious if its premise on the inference of the accused's belief is justified and proved. That however is not the case. Here, again the defence is reiterating the defence of honest belief that the accused was entitled to deal with the funds in question. This has already been analysed and shown to be unsustainable. I have addressed this earlier and affirmed the finding that at the end of the case, on the totality of evidence, the defence of the belief and knowledge of the accused lacks credibility, cannot be sustained and must therefore fail. As such, the argument that dishonesty cannot be established because the accused believed he was legally entitled to deal with the funds is devoid of merit.

[2648]The defence raised another argument. It submitted that the existence of the 'intention' to unlawfully gain or cause unlawful loss must be present at the time the misappropriation is said to be undertaken. In this case, this court has earlier ruled in its prima facie finding that the offence of CBT is completed at the point the funds are transacted out of SRC. This is therefore the material juncture that the dishonest intention must be shown to exist.

[2649]The defence highlighted, however, that in respect of the RM10m that was credited into the account of the accused on 10 February 2015, the pertinent funds were transacted out of SRC on 5 February 2015 and 6 February 2015. On these two dates, there were already cheques in excess of RM7m due. These outstanding amounts were also regularised by cash deposits of RM1.8m. The evidence as a whole, so the defence argued, reflects that the accused could not have known, contemplated or even suspected that there was a need for funds to be immediately deposited into the accounts.

[2650]The circumstances established by the evidence therefore leans in to favour the inference that the belief and state of knowledge of the accused was that the funds in the account were sufficient and could be utilised at his discretion.

[2651]This argument is essentially again predicated on the position that the accused held the belief that the funds in his accounts are from Arab Royalty donations. This has already been shown to be unsupported by the totality of evidence, incapable of belief and patently untrue.

[2652]In any event, even though I agree that the dishonest intention must coincide with the incidence of misappropriation, there is no requirement to show that utilisation of the misappropriated funds must happen at the same time. The element of dishonesty may be inferred from proven facts. That may, as mentioned earlier, include utilisation or gain of the misappropriated funds by an accused which could be taken into account as relevant evidence of subsequent conduct under s 8 of the Evidence Act 1950.

[2653]The defence further added that evidence shows that 99.97% of the RM1 billion alleged donations that were remitted into the accused's Account 694 from 2011–2013 was not utilised for any personal financial gain or wealth, but instead towards CSR initiatives (social, political, community and charitable causes) and for the 13th General Elections, which was established in line with the general intimations from King Abdullah for the leadership and government of the day to continue and Malaysia's stability to be preserved.

[2654]As for the three accounts opened in 2013, namely the Accounts 880, 906 and 898, the defence submits that the total amount of funds utilised by the accused either through cheques issued or credit card transactions amounted to RM261m. Out of this amount, the evidence accounts for the utilisation of RM210m. All funds in the accounts were believed to be from Arab Royalty donations which was intimated as being remitted in 2014 or from the earlier funds from Account 694 being part of the donations received in 2013.

Evidence establishes that 98% of the use of the RM210m was towards CSR initiatives. There was, the defence argues, no use of the funds for personal financial enrichment or wealth.

[2655]As such, the defence maintained that the utilisation of the funds as aforesaid negate the existence of an intention to obtain unlawful gain and therefore the ingredient of dishonesty cannot be said to be proven beyond reasonable doubt.

[2656]This narrative has already been shown to be flawed. First, the belief that the funds were from Arab Royalty cannot be accepted. Secondly, in any event, the so-called CSR projects were predominantly arranged through political organisations subordinate to the leadership of the accused such that it is untenable to say that these CSR spending were not for his personal benefit. It plainly was for the accused's personal political popularity, support and advantage, collaterally if not directly.

[2657]Thirdly, however trifling the defence may wish to make it be when compared to the aggregate sum of RM1 billion, as mentioned earlier, there had been spending of substantial sums of monies for private wealth, albeit calculated by the defence to be less than 1% of total spending vis a vis Account 694. And in its submission of no private expenses utilised from the funds from the three accounts in 2014 and 2015, the defence conveniently ignored the credit card purchases in Italy in August 2014 and in Hawaii in December 2014.

Whether statutory presumption of dishonesty inapplicable

[2658]Under s 409B of the Penal Code, as discussed earlier, there is a statutory presumption of dishonesty to be applied upon a finding being made that the ingredient of 'misappropriation' has been made out. In this case, as the defence correctly observed, I did not invoke this presumption when I delivered my prima facie ruling, opting instead to make specific findings of fact by which the ingredient of 'dishonesty' is made out by the evidence. The defence thus argued that the presumption is not applicable and there is no burden on the accused to rebut the same 'on a balance of probabilities'.

[2659]The contention of the defence is correct. I have discussed my position on the use of presumptions in the section on the charge for the abuse of position under s 23 of the MACC Act earlier. It is in my view an approach that better promotes a fair trial in a criminal proceeding that a presumption (which under the law requires an accused to rebut on a balance probabilities instead of merely to cast a reasonable doubt on the prosecution case) need not be invoked when the trial court finds sufficient evidence to establish the elements of an offence without having to rely on any statutory presumption.

[2660]I am not unmindful of the decision of the Court of Appeal in *Uche Francis Chukwusome v Public Prosecutor* [2016] MLJU 1170; [2016] 1 LNS 513 which the defence says held that once a trial court chooses not to apply a statutory presumption in its ruling at the close of the prosecution's case, the presumption is no longer applicable and cannot be thereafter applied at the end of the case. However, I am guided more by the decision of the Federal Court on this subject in the case of *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1; [2019] 5 CLJ 780, as I discussed in the said section earlier.

CONCLUSION

[2661]On the totality of the evidence, I am satisfied that it has been established beyond reasonable doubt that the accused was a director of the company (as defined under s 402A of the Penal Code) and entrusted with the dominion over the property of the company, in respect of which funds belonging to SRC of the sum of RM42m was misappropriated and converted for his own use, with dishonest intention, which was to cause wrongful gain to himself and wrongful loss to SRC, as defined under ss 23 and 24 of the Penal Code. The defence has failed to cast any reasonable doubt on the prosecution's case.

The three money laundering charges under s 4(1) of the AMLATFPUAA

[2662]The crux of the defence of the accused on the three money laundering charges is twofold. First is the key contention that the predicate offences of CBT and abuse of position have not been proved. Secondly, the mental element has not been established against the accused and there is no wilful blindness. In other words, the defence submits that two ingredients of the money laundering offence have not been proved beyond reasonable doubt.

First ingredient — Receipt of RM42m

[2663]Referring back to the three ingredients of the offence of money laundering under s 4(1)(b) of the AMLATFPUAA, as charged, on the first ingredient, there is no true dispute that the RM42m from SRC was received in the accounts of the accused. The only challenge posited by the defence is that there is no evidence that the RM42m was derived from the RM4 billion financing by KWAP to SRC. I have already ruled that this argument is without basis because showing the RM42m to be the property of SRC other than proof that it was transacted out of SRC (as money trail has made demonstrably patent) is neither a requirement of the offence nor of the charges.

Second ingredient – Receipt of proceeds of unlawful activity

[2664]In respect of the second ingredient, in that the proceeds is derived from unlawful activity, I have already also set out the analysis on the evidence and the issues that led to my conclusions that the single charge under s 23(1) of the MACC Act and the three CBT charges have been established against the accused beyond reasonable doubt.

[2665]This therefore means that two out of the three principal ingredients of the offence of the receipt of proceeds of unlawful activity under s 4(1) of the AMLATFPUAA — that of receipt of the RM42m and such funds being proceeds of unlawful activities have been proved by the prosecution beyond reasonable doubt.

[2666]I reiterate that I am in agreement with the submission of the defence that in order to sustain a charge under s 4(1) the prosecution must show that the unlawful activity — in most cases, the predicate offence, from which the proceeds is derived, has been committed. This is manifest even from the language of s 4(1) which refers to the proceeds being from an unlawful activity. The unlawful activity must therefore be shown to have been committed. I have highlighted that the definition of an unlawful activity also extends to an activity that leads to a predicate offence (and not a full or completed offence). Regardless however, in the instant case, much of such disagreement is of little significance because I have found that both offences of abuse of position and CBT which constitute the unlawful activities or predicate offences for the instant three money laundering charges have been shown to be proved beyond reasonable doubt.

The third ingredient – The mental element under s 4(2)

[2667]The remaining defence argument — the second issue — is the challenge on the finding of the actual knowledge of the provenance of the RM42m, given what the defence asserts to be the existence of the inference on the accused's belief and state of knowledge which negates the same.

[2668]The defence maintained that the evidence as a whole established a favourable inference that the belief and state of knowledge of the accused was reasonably sustained throughout the material time. There is therefore no established cause for reasonable suspicion to be raised to the contrary. The element of willful blindness does not arise and there were justifiable grounds for not taking steps to ascertain the provenance of the RM42m.

[2669]It is the contention of the defence that the doctrine of willful blindness cannot be applied given that the belief held by the accused on the Arab

donations was a favourable inference established in the evidence for the reasons that have been raised and discussed earlier, by which the defence meant that the circumstances that were prevailing or appeared to be prevailing throughout the material period from 2011 up to 2015 reasonably justified the accused's continued belief on the existence of further Arab donations in 2014. Further, this belief was inter alia based on the perception of Jho Low's authority and role to facilitate the donations which was fortified by several events including:

(a) Jho Low's intimation that the accused would be awarded the King Abdul Aziz Order of Merit (First Class) by King Abdullah which did materialise January 2010;

(b) the audience with King Abdullah in January 2010 was arranged by Jho Low through the 'back channels';

(c) Jho Low had intimated that the accused's request for increased Hajj quota for Malaysia had been agreed to by King Abdullah prior to official communication on the same being received;

(d) during the Arab Spring crisis, Jho Low arranged for two planes to ferry Malaysian students from Egypt to Jeddah and for the students to transit through Jeddah without visas to the Tabung Haji Complex;

(e) the accused was gifted a the special *kiswah* fabric from King Abdullah;

(f) Jho Low's dealings with Prince Turki, who was at the time highly placed in the Arab Royalty, reflected that he was chosen to act for the Arab Royalty;

(g) the accused testified that he had himself thanked King Abdullah for the donations personally;

(h) the accused's reliance on Jho Low indicating that the USD620m was to be returned to Tanore Finance Corp, whereby the accused repeated that his belief was based on dealings Jho Low had with Prince Turki; and

(i) all remittances being indicated by Jho Low also followed with Jho Low providing Datuk Azlin and AmBank with supporting documents in the form of the four Arab letters (D601–D604) were fully reported to the AmBank, BNM and the Governor, with no issues being raised.

[2670]I have set out in the section on the CBT charges the reasons as to why in my judgment, the circumstances which were prevailing then did not at all justify the accused to hold such a belief. In short, and at the risk of repetition I again say that it was incredible for the accused who was then the Prime Minister to have completely trusted what Jho Low is claimed to have said about the wish of King Abdullah to provide the personal donation to the accused without making any confirmatory verification with the Saudi monarch or any KSA officials which could have been so easily done.

A **[2671]**Despite however remarkable the achievements of Jho Low vis a vis the Saudi Royalty in the eyes of the accused, or however the accused perceived the relationship between Jho Low and Prince Turki, it is too far-fetched to believe that the accused, more so as the Prime Minister of the country, had simply trusted in what was conveyed by Jho Low to him and gladly accepted the
B extremely large sums of foreign funds that flowed into his personal accounts without any desire or moral conscience of wanting to find out more about the alleged donation other than spending on them.

C **[2672]**Not only did the accused not seek to confirm the personal donation from King Abdullah upon being informed by Jho Low in 2010. The accused in fact never did so throughout the entire period from 2010–2014, and despite the production of four of such so called Arab letters (D601–D604) which preceded the massive flows of foreign funds, in the aggregate total of well in
D excess of RM2 billion, into his personal accounts.

[2673]More specifically on the relevant period of the charges concerning the receipt of the RM42m on 26 December 2014 and 10 February 2015 in the accused's Accounts 880 and 906, I have found that this purported reliance by
E the accused on this belief of donation from King Abdullah is wholly discredited since the accused had already returned USD620m in 2013 after the 13th General Elections (incredulously without any note of explanation to King Abdullah), only for a further RM49m be remitted to the accused's account in 2014 from the same source unsolicited, and unquestioningly accepted and
F further utilised by the accused.

[2674]If the earlier donations from 2011–2013 somehow did not trigger the accused to make the necessary confirmatory inquiries, the fourth tranche of remittances in 2014 must most certainly have, more so as the accused himself
G testified of being uncomfortable of having large sums of monies in his personal accounts that led to the return of USD620m in 2013. But still, the accused never did.

[2675]There was not even any note of acknowledgement let alone of profound
H gratitude penned by the accused to King Abdullah for the alleged donations from the monarch. I have also concluded that the assertion that the accused had thanked King Abdullah in person for the donations is a feeble excuse which is mentioned only during re-examination. It is also unsubstantiated despite the accused having written two letters to the Saudi monarch during the period.

I **[2676]**The evidence of the defence witnesses — DW4, DW5 and DW6 concerning the meeting in Riyadh in January 2010 is riddled with material discrepancies, and their testimony on King Abdullah having specifically mentioned to the accused about the personal financial donation and matters

related thereto at the Riyadh meeting is wholly implausible as the accused himself did not mention this in his own testimony.

[2677]The defence contended that even the investigating officer (PW57) stated that the accused in his statement recorded by the MACC had held out his belief that the monies in his accounts were donations which he could utilise towards his CSR activities and the letter in D601–D604 gave the accused the impression that the donations were made. Again, this is not a new argument. The law is clear in that just because the accused had mentioned his purported belief to the MACC did not mean it is true, regardless of how many times he wished to repeat it.

[2678]The defence additionally took the position that whilst the belief and state of knowledge of the accused is not determined on the authenticity of the D601–D604 letters, the evidence adduced provides admissible secondary evidence relating to the verification of the authenticity of the letters of D601–D604 being made by the MACC directly with the author of the letters and through his lawful agent and attorney.

[2679]It is to be observed that the originals of the four letters were not produced in court and the parties agreed that the marking of these as defence exhs D601–D604 is to confirm the existence of the same. I cannot agree however, that they nevertheless supply admissible secondary evidence relating to the verification of the authenticity of the letters of D601–D604 being made by the MACC directly with the author of the letters and through his lawful agent and attorney. This is because of two main reasons.

[2680]First, as I have discussed, the letters themselves do not inspire much confidence at all. Far from it. For the letters alone would sufficiently demolish the accused's defence of honest belief that the provenance of the funds is King Abdullah. As I have examined in the section on the CBT charges, the accused testified he did not even know who the writer of the letters was and what his connection to King Abdullah was, if any. None of the letters even mentioned King Abdullah or the expression of support made by the monarch in the January 2010 meeting in Riyadh. But the accused had no issues at all with these glaring alarm bells and red flags and instead continued to insist that the funds must have come from King Abdullah. Because Jho Low had said so.

[2681]It is all too convenient for the defence to now say that the identity of the parties involved in the remittances of the funds would have been known to AmBank and reported to BNM who would have corroborated the genuineness of the reported purpose of the remittances throughout 2011–2014 and authenticity of the supporting letters in D601–D604 that were provided to evidence the same. It is not disputed that funds did enter the personal accounts

of the accused. Neither is it denied that the four so called Arab letters had been made available to AmBank and to BNM.

[2682]But it is as if the accused, then the Prime Minister and Finance Minister of the country, was expecting BNM to establish the nexus between the person whose name is stated in the four letters, namely the said Prince Saud and King Abdullah when the accused himself never bothered to do so, claiming absolute trust in what was conveyed to him by Jho Low.

[2683]The fact that copies of the four Arab letters (D601–D604) were extended to AmBank and BNM which is part of the exchange control requirements does not assist the defence because it served only to perpetuate the stance of the accused to feign ignorance. After all, this was a situation where AmBank and BNM were being notified by no less than the Prime Minister and Finance Minister of the country that he was expecting donations of huge sums of funds to be remitted from the Royalty of KSA into his personal accounts.

[2684]I cannot agree with the argument that the accused's genuine belief on the Arab donations being made from 2011–2014 was corroborated when the MACC had occasion to verify the donations and the authenticity of the D601–D604 letters directly from the members of the Arab Royalty in November 2011. As I have discussed earlier, the identities of the individuals claimed to be Arab princes could not be properly verified and in any event the statement taken by MACC from the alleged writer of the letters, Prince Saud, was not even tendered in evidence. This is entirely expected though, because that statement was in fact recorded from an attorney for the said Prince Saud, purportedly given by the attorney on behalf of Prince Saud. Prince Saud himself never personally gave his statement to the recording officer of MACC. He refused to give his statement purportedly on the ground of immunity which none of the MACC officers who were there could truly articulate what this really means.

[2685]Another evidence which the defence considered to support its case which I have found to be unreliable relates to the presence of Eric Tan at the palace where his statement, like that purportedly of Prince Saud, was also then recorded by the MACC. That Eric Tan was observed to be close to those said to be princes, and the events that took place during this trip by MACC to Riyadh suggest that the entire affair was a mere sham even though the government machinery was involved and the MACC entourage were treated as if they were state guests.

[2686]Furthermore, no weight is given to the statement recorded by the MACC from Eric Tan (D801) despite his claim therein that he was a nominee of King Abdullah, Prince Turki, Prince Saud and other members of the Royal

family. He also claimed that entities such as Tanore Finance Corp and Blackstone were related to the Arab Royalty, and that transactions matching the remittances of the Arab donations from 2011–2013 into Account 694 (D788, D789 and D790) were all undertaken by Eric Tan on the instructions of his principals. Eric Tan could not now be produced as a witness and the statement which was pre-prepared and not in the usual form of questions and answers contains entirely bare assertions without any documentary support. In my judgment, this statement, taken in November 2015, was a convenient afterthought designed to provide a fabricated confirmation of the Arab donation narrative.

[2687]I have also discussed in my earlier analyses on the abuse of position and CBT charges that reliance on the announcement (D780) by the former attorney general (DW14) on 26 January 2016 who cleared the accused of any criminal wrongdoing concerning the deposit of the SRC's RM42m into Accounts 880 and 906 of the accused. I reiterate that DW14 himself agreed that he had no knowledge of any further investigations conducted by MACC on the matter after his press conference.

[2688]As such, any assertion that the circumstances prevailing provided no cause for suspicion to arise and the accused reasonably did not have cause to enquire into any particular transaction during the material period is absolutely perverse given the wealth of evidence to the contrary.

[2689]Further, I have also found that the defence of the accused that he had no knowledge on the account balances and the source of funds because he tasked the management of his personal accounts, particularly on ensuring sufficiency of funds in the same to Jho Low, Datuk Azlin and Nik Faisal to be similarly contrived and does not raise any reasonable doubt on the case of the prosecution that the accused instead had knowledge of the same as demonstrated by the evidence discussed earlier.

[2690]The arguments that on the further donations from the Arab Royalty pursuant to D604 in 2014, the circumstances appeared to be the same as and not differentiated from the past three years is patently untrue, as is the theory that the sheer large volume and frequency of the transactions throughout 2011–2015 (where hundreds of cheques from Account 694 had been issued and cleared) lacks credibility. Nor less believable is the contention that no personal cheques of the accused had ever been dishonoured because Jho Low, in subterfuge, wanted to maintain the appearance that the circumstances in 2014 were the same as prevailing since 2011. All these have been discussed earlier in the section on CBT, where it has been established that the cheques never bounced because the three were tasked to ensure they never did, and the accused was assured of the same, which indeed was the case.

[2691]The defence submitted that in respect of the defamation suit, the accused elaborated in para 20.9 of his reply and defence to the counterclaim (D611) and that on 3 July 2015 and 8 July 2015 he responded to the publications by the *Sarawak Report* (D771) and *WSJ* (D772) and stated that he did not take any funds of 1MDB and SRC for personal gain. This clearly shows that the accused did not deny that he received 1MDB and SRC funds. He instead emphasised that he did not use them for personal gains. This merely further confirms the prosecution's case that the accused knew that the SRC funds entered his Accounts 880 and 906 as specified in the charges.

[2692]It is interesting that the defence highlighted that the accused relied on the MACC press releases (D805) and (D806) in his reply in the defamation suit (D611) as being exculpatory because MACC publicly announced that verification of the donations being made to the accused had been obtained from the donor in the Middle East. The defence states that notably these releases (D805 and D806) also outlined that DSN would be asked to provide a statement to the MACC in due course.

[2693]Evidence shows that it is only after these releases by MACC that the accused began to show some attempts at trying to clear his name. Similarly, the defamation suit was filed by the accused in late October 2015 only after the said releases by MACC. The notion that the accused had contemporaneously acted to defend his reputation and declare his innocence by expeditiously taking steps to institute the defamation suit rings hollow. And still the accused did not lodge any police report. He never did.

[2694]I must repeat what Abang Iskandar JCA (now CJ (Sabah and Sarawak)) said in *Azmi bin Osman v Public Prosecutor and another appeal* [2016] 3 MLJ 98; [2015] 9 CLJ 845 on the doctrine of wilful blindness in the money laundering regime, specifically on s 3 of the previous AMLATFA (now s 4(2) of the AMLATFPUAA) as follows:

> [35] ... With respect, we agree with the learned deputy on this issue on the true effect of paras (aa) and (bb) being the mens rea element in the definition of money laundering under s 3 of the AMLATFA.
>
> [36] *Those paras (aa) and (bb) define the mens rea necessary to turn the preceding actus reus (conduct) into a money laundering offence. It does not excuse wilful blindness on the part of the accused person.* There is no room for safe harbours, where proceeds of an unlawful activity may find itself quietly nestling in so-called bank accounts of 'innocent' account holders. *A bank account holder must be vigilant and must take steps to ensure that monies that are received in his account are not proceeds of any unlawful activity and that he knows that the source of those monies is lawful, lest he runs afoul of AMLATFA and runs the risk of being charged for an offence of money laundering.*
>
> *The doctrine of wilful blindness imputes knowledge to an accused person who has his suspicion aroused to the point where he sees the need to inquire further, but he*

deliberately chooses not to make those inquiries. Professor Glanville Williams has succinctly described such a situation as follows: 'He suspected the fact; he realised its probability but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone is wilful blindness.' (Glanville Williams, *Criminal Law 157*, 2nd Ed, 1961). Indeed, in the context of anti-money laundering regime, feigning blindness, deliberate ignorance or wilful ignorance is no longer bliss. It is no longer a viable option. It manifests criminal intent. (Emphasis added.)

[2695]I do not think that given the facts and evidence as stated, as the account holder the accused in the instant case before me could be said to have been vigilant and taken steps to ensure that the RM42m received in his accounts are not proceeds of any unlawful activity and that he knows that the source of those monies is lawful. The circumstances which in this case so patently aroused suspicions in an overwhelming fashion lead only to the irresistible conclusion that the accused deliberately chose not to question and probe substantive questions that plainly required verification, so that he could deny knowledge.

[2696]This is wilful blindness. And the law treats this as knowledge. In any event, the mens rea or the mental element of the offence under s 4(1) is specified in s 4(2) which has been satisfied. The only other plausible explanation is that the accused actually knew from day one that the whole King Abdullah donation narrative was an elaborately orchestrated invention intended to subvert the truth and was totally devoid of merit.

[2697]That the accused was wilfully blind to the receipt of the proceeds of the unlawful activities (if not having actual knowledge) is even clearer when regard be had to the recent judgment of the Federal Court in *Maria Elvira Pinto Exposto v Public Prosecutor* [2020] 3 MLJ 21; [2020] 5 CLJ 1 where Tengku Maimun Tuan Mat (Chief Justice of Malaysia) affirmed the threshold requirements for willful blindness in the following fashion:

[41] *The law only requires the accused to inspect or enquire when reasonable cause for obvious suspicion arises, and if the accused takes no step or effort to dispel this lingering suspicion then he or she is presumed to have known and accepted the risk of that suspicious endeavor. The facts of this case do not warrant the application of the doctrine of willful blindness to the appellant. The appellant could not be said to have shut her eyes to the obvious when there was nothing or even remotely suspicious to begin with.*

[42] In *Tan Kiam Peng v Public Prosecutor* [2008] 1 SLR 1 it was held:

... willful blindness was treated as the legal equivalent of actual knowledge. To establish willful blindness, there had to be the appropriate level of suspicion that led to a refusal to investigate further. If controlled drugs were slipped into a respondent person's bag without his or her knowledge, no offence under the Act would have been committed. On the other hand, if a respondent knew that he or she was carrying controlled drugs, merely inquiring as to the nature of the drugs

might not be sufficient. If the respondent chose to assume such a large risk by trafficking drugs without establishing the true nature of the drugs he or she was carrying, this was willful blindness.

[2698]It is imperative that before this doctrine can be applied, there must have arisen a reasonable cause for obvious suspicion, and it is only if an accused takes no step to investigate further and dispel this suspicion can he said to be willfully blind. In the instant case, circumstances then prevailing and the event that transpired as I have analysed earlier were such that it had to be patently obvious to the accused that they had given rise to such a considerable degree of suspicion that the funds could not have been from King Abdullah. However, the accused took not a single step to investigate in order to find out the truth of the matter. This is willful blindness. In any event, the accused's defence that he honestly believed that the funds remitted into his accounts were donations from King Abdullah is nothing but an improbable concoction.

[2699]It is noteworthy that the Federal Court in *Maria Elvira Pinto Exposto v Public Prosecutor* also referred approvingly to another decision of the Singapore Court of Appeal in the case of *Public Prosecutor v Hla Win* [1995] 2 SLR 424 which established that it is wilful blindness where a person deliberately shut his eyes to the obvious because he did not want to know what would be taken to have the necessary knowledge and like in the instant case before me, chooses merely to rely on the assurances of others without taking steps to verify the assurances. The Court of Appeal held thus:

> 48. The mens rea of the offence requires an accused person to possess knowledge of two different facts. First, the accused must know he is bringing drugs and secondly, that he is bringing the drugs into Singapore. In the instant appeal, I was concerned only with the former requirement. It must be appreciated that the concept of wilful blindness qualifies the requirement of knowledge (see *R v Griffiths* (1974) 60 Cr App R 14). As Professor Glanville Williams aptly remarked in his *Textbook on Criminal Law*, at p 125:
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> > ... the strict requirement of knowledge is qualified by the doctrine of wilful blindness. This is meant to deal with those whose philosophy is: 'Where ignorance is bliss, 'tis folly to be wise'. To argue away inconvenient truths is a human failing. If a person deliberately 'shuts his eyes' to the obvious, because he 'doesn't want to know,' he is taken to know.
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> 49. To this end, the Act actually displaces the presumption of innocence in favour of the accused by providing for the presumption within s 18(2) that the accused who is in possession of the drug has knowledge of the nature of that drug. Therefore, the burden is on the accused to rebut the statutory presumption on a balance of probabilities. The established case law has set out some guidelines in considering whether the presumption of knowledge has been rebutted. In *Ubaka Chris Chinenye v PP* [1994] 3 SLR(R) 401, the principles laid down in *Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356 and modified in *Tan Ah Tee v PP* [1979–1980]

SLR(R) 311 were applied by the trial judge. In its grounds of judgment, this court quoted (at [21]) the following passage by the trial judge:

> ... ignorance is a defence when there is no reason for suspicion and no right and opportunity of examination, and ignorance simpliciter is not enough ...

50. At this juncture, I emphasise that where the accused, who is not an innocent custodian in the sense that the drugs were planted in his bag without his being aware of them, accepted the goods in circumstances which rendered the taking of the precaution of satisfying himself that the goods were what they purported to be and were not drugs an imperative, then, *if he did not take the trouble to inspect them, but merely relied on another person's assurance, he would not rebut the statutory presumption of knowledge. In fact, he would be guilty of wilful blindness to the obvious truth of the matter.* (Emphasis added.)

[2700]It bears repetition that in the instant case, the accused claimed to have relied on the information allegedly conveyed by another — Jho Low, that King Abdullah would be making personal donations to the accused, without the accused taking any steps to check on the authenticity of the provenance of the funds which were remitted into his personal accounts, from 2011–2015, either before, during or after such remittances, and remained oblivious to the many obvious considerations that ought to have triggered him to make such inquiries.

[2701]It is not just in the above factual situation that the accused had elected to shut his eyes to the obvious facts that existed and raised suspicions. In a wider context, but still focused on the time period towards the end of 2014 and early 2015 (which coincide with the dates specified in the money laundering charges), the accused was then the sitting Prime Minister and Finance Minister of the country.

[2702]Funds to the tune of millions were entering his personal bank accounts. He did not deny knowledge of the funds entering his accounts but instead claimed that the monies were donations from King Abdullah even though this 'donation funds' had almost dried up because of the numerous cheques issued by him. At the same time, he said he had no knowledge of the exact amount of the alleged Arab donations entering his accounts (apart from admitting he was aware of the four Arab letters specifying the sums) but continued to spend regardless. He further claimed that he was only basing his cheque expenditures on the confirmation provided by Datuk Azlin who would tell him not the balance, but whether if he was able to issue a cheque. The accused thus said he did not know the balances available in the accounts but conveniently failed to inquire the bank balances from Nik Faisal or Datuk Azlin. In view of the large balance of billions in Account 694 and subsequently millions in his other accounts, it is only reasonably expected that the accused would refer to his bank statement at least every once in a while.

[2703]His testimony that he did not have sight of his bank statement from the years 2011–2015 is scarcely credible. It certainly amounts to wilful blindness, if not having actual knowledge, of the proceeds of the unlawful activities in his bank accounts. This is especially so given the absence of evidence that the accused enquired on the source of the funds at the material time relevant to the charges even when he knew the USD620m balance of the alleged Arab donations had been returned in 2013 and he no longer had billions in his account, and the RM162m retained in Account 880 had also been fully utilised by September 2014. More so, the accused himself agreed he did not request for further funds post the return of the USD620m, yet the fourth tranche pursuant to the fourth Arab letter happened in 2014, unsolicited.

[2704]Despite the letter (D604) specifying the 'donation' of GBP50m, only one fifth of that amount was remitted into the account of the accused, another obvious suspicion which still, so the accused claimed, did not trigger him to make enquiries. And it is beyond dispute that whilst the accused himself admitted that he had tasked Datuk Azlin, Nik Faisal and Jho Low to ensure funds were readily available in his accounts for him to spend it but did not think to inquire where the funds were sourced by these three men.

[2705]It cannot be doubted that the conclusion that can be drawn from the foregoing is the inevitable and inescapable one which is that despite the very substantive and copious basis for reasonable cause for suspicion having arisen, which had manifested in crystal clear fashion, the accused had, belying his experience and intelligence, deliberately chose to shut his eyes to the obvious. The circumstances as such show the clearest picture that the accused must have reasonably suspected the source of the funds but deliberately chose not to inquire on it. Instead, the accused claimed utter ignorance and placed the responsibility on other persons who are presently either missing or since departed.

[2706]I should refer to two other cases of high authority on the doctrine of wilful blindness to demonstrate further its application to the instant case. In the Court of Appeal decision in *Public Prosecutor v Herlina Purnama Sari* [2016] MLJU 1824 Raus Sharif PCA (later Chief Justice of Malaysia) observed as follows:

> [44] Wilful blindness necessarily entails an element of deliberate action. If the person concerned has a clear reason to be suspicious that something is amiss but then embarks on a deliberate decision not to make further inquiries in order to avoid confirming what the actual situation is, then such a decision is necessarily a deliberate one. The key threshold element in the doctrine of wilful blindness itself is that of suspicion followed by (and coupled with) a deliberate decision not to make further investigations. Whether the doctrine of wilful blindness should be applied

to any particular case would be dependent on the relevant inferences to be drawn by the trial judge from all the facts and circumstances of the particular case, giving due weight, where necessary, to the credibility of the witnesses (see *PP v Tan Kok An* [1995] 4 MLRH 256).

[45] The concept of 'wilful blindness' had been discussed in a number of local cases but it seems to have had its genesis in the dissenting judgment of Yong Pung How CJ (Singapore) in the case of *Public Prosecutor v Hla Win* [1995] 2 SLR 424. The doctrine of 'wilful blindness' can be summarised to be applicable to a situation where the circumstances are such as to raise suspicion sufficient for a reasonable person to be put on inquiry as to the legitimacy of a particular transaction. To put it another way, if the circumstances are such as to arouse suspicion, then it is incumbent on a person to make the necessary inquiries in order to satisfy himself as to the genuineness of what was informed to him. Should he fail to embark upon this course of action, then he will be guilty of 'wilful blindness'. In other words, he is then taken to know the true situation. He then cannot be said to have either rebutted the presumption of knowledge or have raised a reasonable doubt as to his knowledge of the situation.

[2707]Further jurisprudential premise for this doctrine is explained by the House of Lords in the case of *R v Saik* [2006] 4 All ER 866 (TAB 49), where Lord Nicholls of Birkenhead stated as follows:

[61] ... The minimum requirement is that, when he entered into the agreement to launder the money that was to be handed over to him, the defendant suspected that the property was criminal proceeds and that he had reasonable grounds for doing so. The problem is that suspicion falls short of knowledge.

[62] *The margin between knowledge and suspicion is perhaps not all that great where the person has reasonable grounds for his suspicion. Failure to ask or to obtain an answer to the obvious question may be described as wilful blindness*. In *R v Griffiths* (1974) 60 Cr App Rep 14 at p 18, James LJ said that to direct a jury that, in common sense and in law, they may find that the defendant knew or believed goods to have been stolen because he deliberately closed his eyes to the circumstances was a perfectly proper direction. *That no doubt is why, for the purposes of the substantive offence of laundering the proceeds of criminal conduct, knowledge and suspicion for which the person has reasonable grounds are treated by the statute in the same way. It is immaterial, for the purposes of this offence, into which of these two categories the defendant falls. In either case he will have the necessary mens rea if he does any of the acts that the subsection refers to for the purpose of assisting any person to avoid prosecution for an offence or the making or enforcement of a confiscation order*. (Emphasis added.)

[2708]Ultimately, the defence's contention that the accused had justifiable reasons not to suspect anything untoward is deeply flawed. The prosecution evidence establishes wilful blindness on the part of the accused, and the defence evidence, particularly that of the accused does absolutely nothing to challenge the same. Indeed, his evidence further supports the case of the prosecution. The

prosecution has thus, at the end of the case, proved this mental element of the offence beyond reasonable doubt, warranting the application of the doctrine of wilful blindness and s 4(2)(b) given that the accused had deliberately shut his eyes and chose not to verify the origins of the funds, but instead relied wholly on others, whilst at the same time spending such funds, including the RM42m for his own purposes and benefit.

[2709]For the avoidance of doubt, I must emphasise that notwithstanding the finding on the accused being wilfully blind to the receipt of the proceeds of unlawful activities in his Accounts 880 and 906 as charged in the money laundering offences, thus the prosecution fulfilling the requirement of the mental element of the offence under s 4(2)(b) of the AMLATFPUAA, the facts and evidence of this case as relevant to the dishonest intention and knowledge for the CBT charges also warrant the inference that the accused knew that the RM42m that flowed into his accounts were from SRC under s 4(2)(a) of the AMLATFPUAA.

[2710]It is trite that the court can find actual knowledge from proven facts or draw inferences that an accused had the necessary knowledge. Thus, in *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19; [2009] 1 CLJ 717 the Federal Court held plainly:

> Proof of knowledge is very often a matter of inference. The material from which the inference of knowledge can be drawn varies from case to case. It would be sufficient for the prosecution to prove facts from which it could properly be inferred that the accused had the necessary knowledge.

[2711]And in distinguishing inference from conjecture and suspicion, Edgar Joseph Jr SCJ for the Supreme Court in the case of *Sundram v Arujunan & Anor* [1994] 3 MLJ 361; [1994] 4 CLJ 300 instructively explained in the following terms:

> In *Jones v Great Western Railway* (1930) 144 LT 194 at p 202, Lord Macmillan explained the meaning of an inference and its effect in law, thus: 'An inference in the legal sense is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of proof'.
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> The question therefore arises, what is a reasonable inference? The answer to this question is provided by Lord Wright in *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152 at pp 169–170:
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> > Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had actually been observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of

inference fails and what is left is mere speculation or conjecture. A

[2712]I need not again repeat the same, suffice that I briefly mention the various objective facts such as the instruction in P277 issued by the accused, the BBM conversations (P578) between PW54 and Jho Low which referred to and acted on messages from the accused to Jho Low, evidence of Chairman of SRC (PW39) and PW42 on the influence and role of Nik Faisal (also the mandate holder for the personal accounts of the accused), evidence of Ung Su Ling (PW49) on the transfer instructions received from the accused's principal private secretary for the transfers on the RM42m from IPSB to the accused's Accounts 880 and 906, the evidence of both PW49 and Dato' Dr Shamsul (PW37) on their separate meetings with the accused informing him of the SRC's RM42m, evidence of the accused's own admission in his affidavit on the RM42m being from SRC, evidence of absence of any complaints from the accused or any of the parties involved on any of the transactions, both which led to the transfers into his account subject to the charges, and the numerous others in his personal accounts, and evidence of the accused's own utilisation of the funds, all point towards the knowledge of the accused that the RM42m came from SRC. B C D E

[2713]The defence evidence on the other hand, does not cast any reasonable doubt on the prosecution's case. The findings of the former attorney general (DW14) and the testimony of the former DPP (DW17) on the absence of the knowledge of the accused is largely irrelevant after 26 January 2016. DW4, DW5 and DW6 gave materially inconsistent evidence on what was said by King Abdullah, even on the critical issue of whether King Abdullah did express his wish to make a personal donation to the accused or not, flatly contradicting the testimony of the accused himself. Additionally, the objective facts surrounding the purported belief of the accused that the foreign remittances came from King Abdullah — from the meeting in Riyadh in January 2010, the intimation by Jho Low to the accused in the middle of 2010 of the alleged wish of King Abdullah to make the donation, the absence of any action on the part of the accused to enquire and confirm on the same throughout the relevant years despite evidence of two letters written by the accused to the late Saudi Monarch, the details in the contents of the four Arab letters which did not correspond with the alleged wish of King Abdullah, the return in 2013 of USD620m to the sender, the absence of any explanation to King Abdullah for the return, the arrival of further donations in 2013 unsolicited and unexplained, the absence of enquiries on the obvious discrepancy between the total sum of GBP50m promised in the fourth letter (D604) and the total amount of merely RM49m actually received in Account 880, and one remittance pursuant to the fourth letter totalling a paltry less than RM12 thousand, among others, overwhelming justify the inference that the accused F G H I

A did not actually believe that the funds came from King Abdullah, and that he actually had knowledge that the monies came from other sources.

[2714]And DW8 gives further support to the evidence that the payment by the accused pursuant to his own instruction in P277 to PBSB and PPC was a repayment exercise. DW8 also agreed that Jho Low had direct access to the accused, consistent with the prosecution's case. The evidence given by the witnesses from MACC who travelled to Riyadh is at best inconclusive and on the whole adds little probative value, if not entirely unreliable. After all, no statement was recorded from the said Prince Saud, the alleged writer of the so-called four Arab letters (D601–D604). And the statement recorded from Eric Tan was pre-prepared by him and contains self-serving assertions without any documentary support.

[2715]As such, given the preponderance and weight of evidence as set out in the foregoing, including his own testimony that Jho Low, Nik Faisal and Datuk Azlin had been assigned with the task of ensuring sufficiency of funds in his personal accounts, the same can truly admit of one reasonable and irresistible inference — that not only did the accused know his accounts balances but he also knew that the accounts would be credited with funds, including from SRC which he controlled (and with Nik Faisal as an authorised signatory), given that the funds from the main source claimed to be the Arab donation was then already depleting.

[2716]Accordingly, quite apart from the issue of wilful blindness, the defence also did not manage to cast any reasonable doubt on the prosecution's case that the accused had knowledge of the RM42m having originated from SRC.

CONCLUSION

[2717]Accordingly, in my judgment, the facts and circumstances established by the evidence do not at all justify the accused's belief and state of knowledge as alleged. Evidence instead establishes knowledge of the accused under s 4(2)(a) and also that the evidence as a whole manifestly pointed to the existence of circumstances on which reasonable cause for obvious suspicion into the legality of funds in the personal accounts of the accused had arisen. Thus, the conduct of the accused, in light of the circumstances, also demonstrated clearly the application of willful blindness under s 4(2)(b) of the AMLATFPUAA on the part of the accused, pure and simple.

[2718]As such, I find that the defence has failed to cast any reasonable doubt on the case against the accused under s 4(1) of the AMLATFPUAA as framed in the three money laundering charges. I therefore hold that the prosecution

has proven its case of money laundering as specified in the three charges against the accused beyond reasonable doubt.

No duplicity of ingredient of unlawful activity in the charges

[2719]The defence also raised other points of law concerning the three money laundering charges. It contends that there is a duplicity of ingredients in relation to the ingredient of 'unlawful activity' that is the question as to which unlawful activity generated the illegal proceeds for these money laundering charges. I agree with the argument of the prosecution that there is no issue of duplicity in relation to the ingredient of 'unlawful activity' because s 4(3) of the AMLATFPUAA clearly provides that when proceeds of an unlawful activity is derived from one or more unlawful activities, such proceeds need not be proven to be from any specific unlawful activity. It reads thus:

> (3) For the purposes of any proceedings under this Act, where the proceeds of an unlawful activity are derived from one or more unlawful activities, such proceeds need not be proven to be from any specific unlawful activity.

[2720]Now, this s 4(3) is applicable because both the abuse of position charge and the three CBT charges are separately the 'unlawful activity' which generated the illegal proceeds for the money laundering charges. Even though *a conviction* for the predicate offence that is the unlawful activity is not a pre-requisite to establish the commission of a money laundering offence under s 4(1) of the AMLATFPUAA, the law requires that the predicate offence or the unlawful activity must be proved to have been committed. I have shown earlier, in the respective sections on the abuse of position charge under s 23 of the MACC Act and the three CBT charges under s 409 of the Penal Code, all these have been proved beyond reasonable doubt.

[2721]I must clarify one point. It is this. Consistent with its erroneous stance that the defence must only seek to cast a reasonable doubt on my prima facie findings (which had called for the defence of the accused on all seven charges) and not on the prosecution case irrespective that I had merely then pronounced a non-exhaustive summary of my key findings, the defence says that the prima facie finding was that the money laundering charges were merely predicated on the commission of the CBT charges, and not the abuse of position charge because I did not mention the latter in my pronouncement. This is a wholly flawed understanding of my prima facie findings (which I will discuss further later) because as I had highlighted right before and immediately after pronouncing my findings that it was only a summary. In any event, in the summary, I did extensively provide my reasons for finding that the ingredients of the offence of abuse of position under s 23 of the MACC Act had been established, which led to the defence being called in the first place.

The proceeds are derived from completed offences

[2722]As I have discussed at the end of the prosecution's case in this judgment, there is no duplicity of charges because first, the offences of abuse of position, CBT and money laundering are made up of different ingredients. Secondly, the definition of unlawful activity does not exclusively refer to the predicate offences. Unlawful activity is also defined as an activity which leads to the commission of the completed offence. This therefore admits of a situation where the proceeds of unlawful activity being derived from a certain activity (of an offence) only and not necessarily from the complete offence.

[2723]More specifically, there is no duplicity because the offences of abuse of position and CBT have been shown at the end of the prosecution's case to have been completed *before* the flow of the RM42m into the accused's Accounts 880 and 906. In other words, this means that the receipt of the RM42m is that of proceeds from an unlawful activity — both abuse of position and CBT.

Whether the case to be proved beyond reasonable doubt is limited to the court's prima facie findings

[2724]At the end of the defence case, the defence made this important submission that the case that must now be proved beyond reasonable doubt is limited to the prima facie case which I found to have been made out against the accused at the end of the prosecution's case.

[2725]It is contended that the grounds which this court pronounced in its ruling on 11 November 2019 which the defence said outline the evidence adduced in the prosecution's case and the determinations thereon by which this court held that all the ingredients of the seven charges had been proved, are the specific findings which make up the substratum on which this court ultimately held that a 'prima facie case' had been made out against the accused.

[2726]The defence asserted that it is these prima facie findings, which are based on the evidence referred to in the grounds which has been therefore found to be sufficient to warrant a conviction on all charges if 'unrebutted' or 'unexplained' within the meaning of s 180(4) of the CPC, which reads:

> (4) For the purpose of this section, a prima facie case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.

[2727]As such, it is only these specific prima facie findings and the evidence cited in support that form the 'case against the accused' on which the defence is to be entered. In other words, the case that needs to be 'rebutted' or

'explained' in order to warrant an acquittal need therefore only be directed at the evidence that makes up the prima facie findings.

[2728]The defence refers to a number of case law authorities in supports of its contention. One is the Federal Court decision in *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85 where these observations on prima facie findings were made:

> Section 180(1) makes it clear that the standard of proof on the prosecution at the close of its case is to make out a prima facie case while s 182A(1) enunciates that at the conclusion of the trial the court shall consider all the evidence adduced and decide whether the prosecution has proved its case beyond reasonable doubt. The standard of proof on the prosecution at the end of its case and at the end of the whole case has thus been statutorily spelt out in clear terms. *The submission made must therefore be ratiocinated against the background of the meaning of the phrase 'prima facie case' in* s 180. Section 180(2) provides that the court shall record an order of acquittal if a prima facie case has not been made out while s 180(3) provides that if a prima facie case has been made out the accused shall be called upon to enter his defence. *A prima facie case is therefore one that is sufficient for the accused to be called upon to answer.* This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal ...
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> The result is that the force of *the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen* ... (Emphasis added.)

[2729]It submitted that the interplay between the prima facie case and the defence case was aptly summarised by the court in *Public Prosecutor v Muhammad Rasid bin Hashim* [2011] 7 MLJ 845; [2011] 3 CLJ 424 as follows:

> [36] Perhaps it would be helpful to put in perspective the true import of the all-important two Latin words in our criminal jurisprudence, namely the unassuming duo: 'prima facie'. It is not only important to do that for the purpose of ascertaining whether the prosecution had established such a case that would justify the court to call for the defence in a charge, but from the point of view of the defence as well, a sound understanding of that term would assist counsel in ascertaining the kind of evidence that may be required to rebut the *evidence thus far adduced by the established case by the prosecution*. For that purpose then, I would like to quote the words of Justice Buhagiar J. in the case *Saminathan & Ors v PP* [1955] MLJ 121 which go as follows: 'A litigating party is said to have a prima facie case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A prima facie case, then, is one which is established by sufficiently strong evidence, and can be overthrown only by rebutting evidence adduced by the other side'. The very same essence was reiterated by learned Justice Augustine Paul FCJ in the case of *Balachandran a/l Selvaratnam v PP* [2005] 2 MLJ 301 where he said when delivering the judgement of the Federal Court thus: 'A prima facie case is therefore on that is sufficient for the accused to be called upon to answer. This in

A turn means that the evidence adduced must be such that it can only be overthrown only by evidence in rebuttal.

...

[42] So, the question that needed to be answered by this court at this stage has been two-fold. One is whether the accused had led evidence in order to rebut the prima facie case established by the evidence led by the prosecution, and two, whether such evidence had created a reasonable doubt on the prosecution's case. (Emphasis added.)

[2730]And according to the defence, this proposition that the evidence which must be rebutted or explained is limited to the evidence which made up the prima facie case at the close of the prosecution's case was recently reiterated in the case of *Karnam Singh a/l Gubakhus Singh & Ors v Public Prosecutor* [2019] 2 MLJ 480; [2018] 1 LNS 1762 where the Court of Appeal stated the following:

[29] Credible evidence means evidence that is capable of belief given by a credible witness. To entitle the accused to an acquittal where a prima facie case had been established against him, he must rebut or explain the evidence already established against him by the prosecution at the close of its case.

[2731]In short, the defence therefore submitted that any other issues raised or suggestions made which do not make up the prima facie findings should not form part of the consideration at all.

[2732]The defence further sought to explain that the consideration under s 182A of the CPC which requires this court to evaluate the evidence as a whole is to determine whether the specific prima facie findings of fact are still 'proven' or alternatively have been 'rebutted' or 'explained'. In other words, it is argued that the determination of whether the specific prima facie findings are still 'proven' or alternatively have been 'rebutted' or 'explained' is based on a re-evaluation of the evidence led during the prosecution's case in light of the defence evidence.

[2733]For this proposition, the defence made reference to a number of authorities. First, another Federal Court decision in the case of *Arulpragasan a/l Sandaraju v Public Prosecutor* [1997] 1 MLJ 1; [1996] 4 CLJ 597 where the pertinent passages from the judgment read:

The second stage comes after the defence has been called. The defence can either *rebut the prosecution evidence or raise a reasonable doubt as to the truth of the prosecution case. At the end of the defence case, it is the duty of court to consider the defence evidence in the light of the prosecution evidence. The court considers the case as a whole.* Then and only then, the court will make a finding on the guilt of the accused. (Emphasis added.)

[2734]Another reference to the Federal Court decision in *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85 is also deemed imperative by the defence, in particular to the following passage:

> Proof beyond reasonable doubt involves two aspects. While one is the legal burden on the prosecution to prove its case beyond reasonable doubt the other is the evidential burden on the accused to raise a reasonable doubt. Both these burdens can only be fully discharged at the end of the whole case when the defence has closed its case. *Therefore a case can be said to have been proved beyond reasonable doubt only at the conclusion of the trial upon a consideration of all the evidence adduced as provided by* s 182A(1) of the Criminal Procedure Code. (Emphasis added.)

[2735]The other is the High Court decision in *Public Prosecutor v Iskandar bin Mohamad Yusof* [2006] 5 MLJ 559; [2006] 6 CLJ 379, where it was held thus:

> [10] As said above when I called the defence I was satisfied that a prima facie case had successfully been established by the prosecution. Factually and legally the prosecution had satisfied all the ingredients and requirements of s 180 of the Criminal Procedure Code. Before arriving at that conclusion as required by the latter section, and as stated earlier, a maximum evaluation of the evidence was conducted by me. *Needless to say that evaluation was totally one sided, in that it was substantially the evidence adduced by the prosecution, though peppered by the accused person's suggestions and answers elicited from witnesses in the course of the cross-examination. Naturally, at that stage, no sworn testimony of the accused person was made available that could prematurely punch holes in the prosecution's story.* Naturally too, whatever was suggested by the accused person that could be helpful to him inevitably would receive unhelpful answers. With such a scenario, the prosecution literally sauntered into the defence stage.
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> [11] *At the defence stage, a different scenario expressed itself. The prosecution's story had to be re-evaluated maximum-like, but this time padded by the additional defence's version, which was given under oath. At the end of the accused person's case, unless the prosecution succeeded at convincing me beyond reasonable doubt, he must be acquitted* ... (Emphasis added.)

[2736]As such, the thrust of the submission of the defence is that there is no burden cast on the defence to meet another case or controvert other versions of facts which did not form part of the prosecution's case which was held to have been made out in the prima facie findings as the same was not the case on which the accused's defence was called. At the end, all that the defence needs to establish is that the evidence as a whole raises reasonable doubt on the continued existence of the 'facts' which the court found to 'exist' in the prima facie case ruling.

[2737]In order to negate these prima facie findings of facts, the defence merely needs to establish that a re-evaluation of the evidence as a whole raises reasonable doubt on the existence of the said facts.The prima facie case is what the accused has been called upon to enter his defence under s 180(3) of the

CPC and therefore is the only case that needs to be explained or rebutted by the defence.

[2738]A crucial corollary of this proposition is the argument of the defence that the prosecution therefore must stand and fall on the evidence as it stood at the close of the prosecution's case which was adduced by the prosecution through the prosecution witnesses. The prosecution cannot attempt to introduce new theories or versions during the defence case.

[2739]The defence also relied on the case of *Public Prosecutor v Wong Thean Fah & Anor* [2010] 1 MLJ 479; [2009] 1 LNS 1089 where it submitted the High Court elucidated that the prosecution's case must be based on evidence which the prosecution adduced through the prosecution witnesses. This evidence is the only basis on which the court finds a prima facie case to have been made out and on which the defence is called on. As such, during the defence case, the prosecution cannot attempt to introduce new facts which did not arise from the testimonies of the prosecution witnesses during the prosecution's case.

[2740]The relevant passages from the judgment of the High Court in *Public Prosecutor v Wong Thean Fah & Anor* [2010] 1 MLJ 479; [2009] 1 LNS 1089 read as follows:

> [103] The prosecution at the defence stage has posed questions which could be perceived as attempts to introduce further evidence to the relationship between the first and second accused ...
>
> ...
>
> [107] Section 180 of the Criminal Procedure Code and the Evidence Act 1950 (ss 137 and 138) have to be taken into account. *The object of the examination-in-chief of the prosecution's witnesses is to get the witnesses to adduce all material facts relating to the charge under s 302 of the Penal Code. The prosecution's case in the proceedings however rests primarily on the statements made to their own witnesses ...*
>
> [108] A difficult situation has however emerged during the defence stage, of the prosecution endeavouring to *elucidate facts which were not brought forth when the prosecution's witnesses were giving evidence.*
>
> ...
>
> [110] ... The *prosecution must, at the end of trial, go beyond what it must show at the close of the prosecution's case*. At the close of the prosecution's case, the prosecution need only raise a prima facie case which, if uncontradicted by the defence, would justify a conviction ...
>
> [111] The sole purpose of citing the above propositions is to recall that a two tiered appraisal must be taken in respect of the prosecution's case firstly at the close of the case of the prosecution and secondly at the close of the trial ... (Emphasis added.)

[2741]In reiterating its submission that the prosecution is disentitled from attempting to depart from the prima facie case and advance a different case or improving on the prosecution's case, the defence also cited the case of *Public Prosecutor v R Balasubramaniam* [1948] MLJ 119; [1947] 1 LNS 79 where the following was held:

> But does the evidence for the prosecution point irresistibly to willful fraud? The fact that this book is incorrect, ill-kept or misleading is not enough; there must be conscious determination to defraud as distinguished from ignorant incompetency ... It is a question of fact for me to decide on the evidence before me; *I am unable to allow the prosecution to attempt to supplement, improve or confirm what may be now a possible though doubtful case by whatever can be elicited from the defence. The Crown case rests at the close of the prosecution*. (Emphasis added.)

[2742]This is an interesting contention by the defence. It is also an especially significant one. It concerns the true remit of a trial court in the discharge of its duty to consider all the evidence adduced before the court at the conclusion of the trial. It also has an important ramification on the basis of the case that the prosecution bears the burden to prove beyond reasonable doubt.

[2743]The prosecution submitted in reply that this proposition of the defence is incorrect and ill-conceived. It principally asserted that the defence's contention is not supported by the cases relied on by the defence, and that the defence's interpretation of s 182A of the CPC is erroneous.

[2744]In my judgment, the answer to this contention is found in s 182A of the CPC which plainly reads as follows:

> 182A Procedure at the conclusion of the trial
>
> (1) At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.
>
> (2) If the Court finds that the prosecution has proved its case beyond reasonable doubt, the Court shall find the accused guilty and he may be convicted on it.
>
> (3) If the Court finds that the prosecution has not proved its case beyond reasonable doubt, the Court shall record an order of acquittal.

[2745]Section 182A(1) thus makes it unmistakably clear that at the end of the trial, in deciding whether the prosecution has proved its case beyond reasonable doubt, this court shall consider all the evidence adduced before it. The operative and all important word is 'all'. A failure to consider all evidence renders any conviction and sentence liable to be set aside on appeal (see the Court of Appeal decision in *Kamran Nemati Hossein v Public Prosecutor and another appeal* [2015] 3 MLJ 636; [2015] 4 MLRA 353) and is a serious

A non-direction which amounts to a misdirection rendering any conviction to be unsafe (see the Court of Appeal decision in *Prasit Punyang v Public Prosecutor* [2014] 4 MLJ 282; [2014] 7 CLJ 392).

B **[2746]**It is manifest that nowhere does s 182A(1) state that the court must only consider the prima facie findings of the trial judge, or that 'all the evidence' is to be construed as being confined to the prima facie findings.

C **[2747]**The proposition that the interpretation ascribed by the defence to s 182A of the CPC to mean that the court has to evaluate the evidence as a whole in order to determine whether the *specific prima facie findings of fact* are still 'proven' or alternatively have been 'rebutted' or 'explained' is also misconceived. There is no such limitation imposed by either s 180 or s 182A of the CPC.

D **[2748]**It cannot be emphasised enough that the court, at this stage of the conclusion of the trial, must evaluate all the evidence before it in order to decide whether the prosecution has proved its case beyond reasonable doubt.

E **[2749]**Further s 182A(1), (2) and (3) all state that the burden of proving beyond reasonable doubt is in relation to the case of the prosecution, not the prima facie findings.

F **[2750]**At the same time it must be appreciated that under s 180(4), a prima facie case is described as one made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction. In this trial, a prima facie case has been established.

G **[2751]**As such, the correct application of this position in law on the duty of this court under s 182A of the CPC is that at the conclusion of the trial, the court must weigh the evidence adduced by the defence as against the totality of the evidence adduced by the prosecution's at the end of the prosecution case, and then determine whether the accused has, in his quest to rebut or explain the prosecution evidence which prove the ingredients of the offence, successfully raise a reasonable doubt on the prosecution's case.

H

I **[2752]**Whilst it is manifest, as has been shown, that the language and construction of ss 180 and 182A does not accord with the proposition put forth by the defence, the cases referred to by the defence too, on closer scrutiny, do not progress this contention of the defence.

[2753]I made reference to the submissions of the defence which twice cited the

Federal Court decision in *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85. The first reference is focused more on the meaning of the determination of a prima facie case. The second, however, gives emphasis on the meaning of proving a case beyond reasonable doubt which occurs at the conclusion of the trial. It is this latter passage which is relevant to the instant case before me, which at the risk of repetition, states as follows:

> [23] As the accused can be convicted on the prima facie evidence it must have reached a standard which is capable of supporting a conviction beyond reasonable doubt. However it must be observed that it cannot, at that stage, be properly described as a case that has been proved beyond reasonable doubt. *Proof beyond reasonable doubt involves two aspects. While one is the legal burden on the prosecution to prove its case beyond reasonable doubt the other is the evidential burden on the accused to raise a reasonable doubt. Both these burdens can only be fully discharged at the end of the whole case when the defence has closed its case. Therefore a case can be said to have been proved beyond reasonable doubt only at the conclusion of the trial upon a consideration of all the evidence adduced as provided by* s 182A(1) of the Criminal Procedure Code. (Emphasis added.)

[2754]In another case relied on by the defence of *Public Prosecutor v Muhammad Rasid bin Hashim* [2011] 7 MLJ 845; [2011] 3 CLJ 424 the passages referred to by the defence speak of the onus on the accused to rebut the evidence adduced by the prosecution. It does not say to rebut the prima facie findings of the court. Yes, the prima facie findings are based on the prosecution case but there is an important difference in terms of what the defence should wish to rebut or explain, in order to deny a finding of the prosecution's case being established beyond reasonable doubt.

[2755]The defence must under s 180(4) seek to rebut or explain the prosecution evidence, not the prima facie findings. That is also the reason why such an endeavour by the defence is intended to establish that the prosecution has not succeeded to prove its case beyond reasonable doubt. It is not a correct formulation in law to say that the defence seeks to rebut or explain and show that the prosecution has failed to prove the prima facie findings beyond reasonable doubt. That would be a serious misconception of the law on criminal procedure.

[2756]Neither does the case of *Karnam Singh a/l Gubakhus Singh & Ors v Public Prosecutor* [2019] 2 MLJ 480; [2018] 1 LNS 1762 stand for the proposition as submitted by the defence in that the evidence which must be rebutted or explained is limited to the evidence which made up the prima facie case at the close of the prosecution case. The Court of Appeal merely stated that to earn an acquittal, the accused must rebut or explain the evidence already established against him by the prosecution at the close of its case. It does not say to rebut or explain the prima facie findings against him.

[2757]Indeed, none of the other cases mentioned by the defence actually explains that it is the prima facie findings that an accused must seek to rebut or explain.

[2758]The passage extracted by the defence from the Federal Court decision in *Arulpragasan a/l Sandaraju v Public Prosecutor* [1997] 1 MLJ 1; [1996] 4 CLJ 597 does not even remotely support the defence's proposition. It clearly stated that the defence can either rebut the prosecution's evidence or raise a reasonable doubt as to the truth of the prosecution case. It does not state rebut the prima facie findings or raise a reasonable doubt as to the truth of the prima facie findings. In fact, the passage expressly specified that, I repeat 'At the end of the defence case, it is the duty of court to consider the defence evidence in the light of the prosecution evidence. The court considers the case as a whole'.

[2759]Similarly, in *Public Prosecutor v Iskandar bin Mohamad Yusof* [2006] 5 MLJ 559; [2006] 6 CLJ 379, the relevant passage stated that at the end of the trial, 'the prosecution's story had to be re-evaluated maximum-like', but this time padded by the additional defence's version, given under oath.

[2760]The defence even sets out an annexure on several cases which it contends show that the defence once called is only to rebut the prima facie findings instead of the prosecution's case. These cases are the decisions of:

(a) the Court of Appeal in *Karnam Singh a/l Gubakhus Singh & Ors v Public Prosecutor* [2019] 2 MLJ 480; [2018] 1 LNS 1762;

(b) the Court of Appeal in *Ho Yee Onn v Public Prosecutor* [2020] 2 MLJ 789; [2020] 2 CLJ 491;

(c) the Federal Court in *Raman a/l Kunjiraman v Public Prosecutor* [2018] Supp MLJ 86; [2014] 9 CLJ 915;

(d) the Federal Court in *Md. Zainuddin Raujan v. PP* [2013] 4 CLJ 21;; [2013] 3 MLJ 773;

(e) the Federal Court in *Pathmanabhan a/l Nalliannen v Public Prosecutor and other appeals* [2017] 3 MLJ 141; [2017] 4 CLJ 137;

(f) the Court of Appeal in *Mohamad Hanafi bin Mohamad Hashim lwn Pendakwa Raya* [2016] 3 MLJ 723; [2016] 6 CLJ 378;

(g) the Court of Appeal in *Codjo Theodore Tchidi lwn Pendakwa Raya* [2018] MLJU 49; [2018] 1 LNS 48;

(h) the Court of Appeal in *Ugonna Philip Nwankwo v Public Prosecutor* [2016] 4 MLJ 244; [2016] 2 CLJ 247;

(i) the Court of Appeal in *Hooman Khanloo v Public Prosecutor* [2015] 5 MLJ 199; [2015] 6 CLJ 1005;

(j) the Court of Appeal in *Public Prosecutor v Bayanjarghal Khaliun* [2018] MLJU 164; [2018] 1 LNS 166;

(k) the Court of Appeal in *Amith Karinja v Public Prosecutor* [2016] MLJU 1438; [2016] 1 LNS 420;

(l) the Court of Appeal in *Patmanathan a/l Logannathan v Public Prosecutor* [2016] MLJU 1668; [2016] 1 LNS 58;

(m) the High Court in *Public Prosecutor v Muhammad Rasid bin Hashim* [2011] 7 MLJ 845; [2011] 3 CLJ 424; and

(n) the High Court in *Mohd Khairul Hafiz bin Yaakob & Anor v Public Prosecutor and another appeal* [2019] MLJU 1910.

[2761]None of these cases however contain any statement in clear support for the proposition that at the conclusion of a trial that in order to warrant an acquittal, the defence is to rebut the prima facie findings of the trial court instead of the case of the prosecution.

[2762]The prosecution in its resistance to this line of contention by the defence, referred to the case of *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003] 1 CLJ 734 where the case of *Haw Tua Tau v Public Prosecutor* was cited which held that if aspects of the evidence of the prosecution taken alone or in combination with other facts clearly call for an explanation which the accused ought to be in a position to give, if an explanation exists, then a failure to give any explanation may allow the drawing of an inference that there is no explanation and that the accused is guilty. Thus it was held:

> On the other hand, if aspects of the evidence taken alone or in combination with other facts clearly call for an explanation which the accused ought to be in a position to give, if an explanation exists, then a failure to give any explanation may as a matter of common sense allow the drawing of an inference that there is no explanation and that the accused is guilty.

[2763]As such, the duty of the court at the end of the defence case and at the conclusion of a trial is to evaluate the totality of all the evidence adduced in the case in determining whether the prosecution has made out a case beyond reasonable doubt against the accused. The duty of the defence, or more accurately what the defence must do to earn an acquittal, is thus not limited to only rebutting the specific prima facie findings and the evidence cited in support thereof by the trial judge at the end of the prosecution's case.

[2764]Another reason why this proposition advanced by the defence is flawed is this. It presupposes a comprehensive and exhaustive prima facie finding being pronounced by the trial judge at the end of the prosecution's case.

A However, it is trite that there is no statutory requirement for a trial judge to prepare grounds of judgment in finding a prima facie case. The Supreme Court in *Junaidi bin Abdullah v Public Prosecutor* [1993] 3 MLJ 217; [1993] 4 CLJ 201, in the judgment of Mohamed Azmi SCJ, held instructively as follows:

B In our opinion, there is also no statutory provision requiring a judge sitting alone to expressly record his reason before calling the accused to enter his defence or to state his findings on the credibility of main prosecution witnesses. But, as a matter of practice, where there is a particular reason for doing so, such as where a submission to answer has been made in a complex case, or where the accused is called to enter a defence on a lesser or alternative charge, judges do sometimes give their reasons. In C uncomplicated cases, such as in the instant appeal, it is not obligatory or even necessary to do so. By calling an accused to enter his defence, it should be assumed that the trial judge must on evaluation of the evidence, have been satisfied that the prosecution had, at that stage of the trial, established a prima facie case which, if unrebutted, would warrant a conviction of the accused. To arrive at such a conclusion, it is inherent that the judge must consider all the evidence adduced by D the prosecution as tested in cross-examination, on a prima facie basis.

[2765]This is also the reason why s 180(4) does not prescribe that to warrant an acquittal, an accused must rebut or explain the prima facie findings. Instead E the accused should do so vis a vis the prosecution case. At the same time, the absence of any obligation to prepare the grounds of judgment when ordering for the accused to enter his defence reinforces the point that at the end of the defence case and conclusion of the trial the overriding focus for the trial court, the prosecution and the defence is the entirety of the evidence adduced before F the court.

[2766]This means all of the evidence adduced by the prosecution and all of the evidence adduced by the defence, where the latter is to be weighed and assessed as against the whole of the former, in order to determine whether the G prosecution has proved its case beyond a reasonable doubt.

[2767]If the proposition contended by the defence is accepted, this pivotal process would run aground since in practice it is also uncommon for a trial judge to deliver a complete judgment detailing the evidence supporting a H prima facie ruling when calling for the defence of an accused. In some public interest and more complicated cases, like presently, the trial judge may usually pronounce a summary of his findings but in the great majority of cases, the decision to call for the defence is only made with a simple and straightforward statement in open court that a prima facie case has been established.

I

[2768]In the instant case, I have made it clear just before and immediately after delivering my oral ruling on prima facie and ordering the accused to enter his defence on all seven charges on 11 November 2019, that the pronouncement constituted *a summary* of my key findings at the end of the prosecution's case.

[2769]Learned lead senior counsel during the closing submissions described my summary of key findings as a full judgment at the end of the prosecution's case. He referred to the transcript of court recording transcription on that day which went as follows:

> Counsel: Yang Arif, it would also greatly help us if we can be provided with Yang Arif's written summary or as Yang Arif said there is a or rather Yang Arif give a hint there is a fuller written judgment but Yang Arif read out the summary. Whatever it is, Yang Arif may or would have the written judgment at the end of the prosecution case we can be well guided by Yang Arif's finding in putting forward our defence, if we can be provided that.
>
> Judge: It's available on CRT.
>
> Counsel: So we will take it that what Yang Arif read is in fact the judgment.
>
> Judge: Summary, yes.
>
> Counsel: But would Yang Arif have the fuller or what?
>
> Judge: No, that's the one.
>
> Cousel : So we will take it as the judgment at the end of the prosecution case from the CRT.
>
> Judge: As I read in open Court, yes.

[2770]It is clear from the above that the court only had, for the benefit of the accused, provide a summary of its findings. There is no written judgment, let alone one which is certified by me. When the lead senior counsel asked whether I would be preparing a full version, my answer was in the negative and that was the only version I drafted must surely be understood to mean that I had decided to provide only that summary. And that that summary is a complete summary but it remains a summary.

[2771]Learned lead senior counsel referred to a commentary he had written in a book entitled *Justice Above All — Selected Judgments of Tun Arifin Zakaria* specifically in relation to the judgment of the former Chief Justice in the case of *Mrs Thitapha Charoenchuea lwn Pendakwa Raya* [2016] 6 MLJ 549; [2017] 1 CLJ 1 (incidentally I was not unaware of this special commemorative book as I sat on its publication committee). In that case, there were three judgments, including one given at the end of the prosecution's case but focus was on the existence of two versions of the written judgment after the conclusion of the trial.

[2772]One was delivered and furnished by the trial court to the parties upon the pronouncement of the verdict, the other provided subsequent to the filing of the notice of appeal against the decision. The Federal Court agreed with the contention that the latter was an improvement of the former, in violation of s 52 of the Courts of Judicature Act 1964, which requires only one judgment be produced once a notice of appeal is filed if it has not already been written. It was

A also ruled that the second judgment would be contrary with s 278 of the CPC which prohibits the court to alter or review its judgment once it has been recorded.

B **[2773]**The only relevance of that case to the present issue is that the Federal Court did also in the judgment of Arifin Zakaria Chief Justice state that while there is no requirement to do so, it is good practice for judges to write the full grounds of judgment even at the end of the prosecution's case. It is noteworthy however that the reason ascribed to this is that the evidence would at that early stage still be fresh in the minds of the judges.

C

[2774]The learned senior lead counsel too in his commentary states that findings on facts, credibility and demeanour in the initial ruling would be captured fresh and therefore be more reliable and assist the trial judge in the continuation of trial during defence stage and in the overall assessment before final decision. This thus demonstrates that the rationale expressed in *Mrs Thitapha Charoenchuea lwn Pendakwa Raya* [2016] 6 MLJ 549; [2017] 1 CLJ 1 for the writing of the full grounds at the end of the prosecution stage is more to assist the judges to complete writing the full grounds at the end of the whole case.

D

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[2775]In *Mrs Thitapha Charoenchuea lwn Pendakwa Raya* [2016] 6 MLJ 549; [2017] 1 CLJ 1 the Federal Court found that the grounds prepared by the judge at the end of the prosecution's already constituted a complete judgment. Nevertheless, for emphasis, I repeat this has no relevance to s 52 of the Courts of Judicature Act 1964 and s 278 of the CPC, which concerns more with the judgment prepared at the end of the trial. Further, in that case, it was found that that judgment did not contain any qualification such as stated as being a draft judgment. The learned lead senior counsel in his commentary clearly writes that length is not the criterion in deciding whether the judgment is a complete final judgment and more importantly any caveat (such as draft decisions as in the case of *Lim Guan Eng v Public Prosecutor* [1998] 3 MLJ 14; [1998] 3 CLJ 769; [1998] 3 AMR 2079) or brief written decisions such as in *Ong Keng Tat v Public Prosecutor* [2014] MLJU 1830; [2015] 1 CLJ 506; [2014] AMEJ 1477) stated by the trial judge in the notes of evidence or the judgment itself would almost in all cases determine the status of that 'written judgment'. In the case before me, the prima facie ruling was expressed to be a summary. A summary of findings is the antithesis of a full and complete judgment.

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[2776]Secondly, in that case, the judgment was signed by the judge and provided to the parties. In the instant case, the summary was pronounced orally and not extended to parties, only that being captured as part of the CRT system, would consequently be available to the parties.

[2777]In any event, the issue whether that judgment at the end of the prosecution's case constitutes the findings or the case that the defence must rebut to earn an acquittal does not arise at all in *Mrs Thitapha Charoenchuea lwn Pendakwa Raya* [2016] 6 MLJ 549; [2017] 1 CLJ 1.

[2778]In the upshot there is no requirement to write any findings at the end of the prosecution's case. If the argument is that any pronouncement by the judge on his findings at the end of the prosecution's case would assist the accused in the preparation of his defence (which was not stated by the Federal Court in *Mrs Thitapha Charoenchuea lwn Pendakwa Raya* [2016] 6 MLJ 549; [2017] 1 CLJ 1) it cannot therefore be right that when a judge writes a summary of his findings he is, at the end of the trial, confined only to consider the evidence on his findings which become the basis which the defence should explain or rebut. This is inconsistent with s 182A which, as stated, mandates the trial court to consider all evidence in the case and in determining whether the case against the accused has been proved beyond reasonable doubt, to evaluate whether the defence has rebutted or explained the case of the prosecution. It goes without saying that this would certainly do little to encourage judges to write their findings when calling for defence.

[2779]If judges are limited to their prima facie findings, even when announced in summary fashion, this would mean that judges are prevented from relying on other prosecution evidence not referred to in the summary at the conclusion of trial, despite having undertaken a positive and maximum evaluation of the credibility and reliability of all the evidence adduced at the end of the prosecution stage. And what if judges choose to mention — because it is merely a summary — only the minimum of evidence that already prove the ingredients although other prosecution evidence is equally relevant to establish that same ingredient. Taking the argument of the defence to its logical conclusion, if the judge does not, as is common, disclose any findings when calling for defence, surely it cannot be contended that there is therefore no prima facie finding for the defence to rebut or explain. Because again, under s 180(4) of the CPC, it is for the defence to rebut or explain the prosecution's case in order to justify an acquittal, and for the trial court under s 182A to consider all the evidence adduced before it and to decide whether the prosecution has proved its case beyond reasonable doubt.

[2780]The defence did also raise the argument that regardless of whether a ruling is pronounced orally or in writing with grounds delivered either in summary or substantively, every trial court is duty bound to outline the basis on which a prima facie case, which include its findings of fact, inferences or invocation of presumptions on the evidence adduced at the close of the

prosecution's case, by which the ingredients of the offences are said to be made out against the accused and to thereafter order the accused to enter his defence thereon.

[2781]It even argued that a failure to do so is a serious misdirection entitling a conviction to be quashed, and a breach of statutory procedure, breach of the principle of administration of criminal justice and an infarction of the accused's constitutional rights. The defence referred in support the provision under s 257(1) of the CPC on the duty of the court to provide principal points in the evidence for the prosecution against an accused so that the court may have an opportunity of explaining them to him, despite this provision being applicable in the case where the accused is unrepresented. It reads:

> 257 Case for prosecution to be explained by Court to undefended accused
>
> (1) At every trial before the Court of a Magistrate if and when the Court calls upon the accused for his defence it shall, if he is not represented by an advocate, inform him of his right to give evidence on his own behalf, and if he elects to give evidence on his own behalf shall call his attention to the principal points in the evidence for the prosecution which tell against him in order that he may have an opportunity of explaining them.
>
> (2) The failure at any trial of any accused to give evidence shall not be made the subject of adverse criticism by the prosecution.

[2782]In addition, I derive no assistance from the case referred to by the defence which it submitted supports its contention. In fact, the following passages from the judgment of Abdul Hamid Omar LP in the Supreme Court decision in *Khoo Hi Chiang v Public Prosecutor and another appeal* [1994] 1 MLJ 265 clearly shows that there is no such requirement to provide reasons for calling of the defence other than in the situation envisaged in that s 257 concerning an unrepresented accused:

> Then it was said that the judge when calling for the defence, had failed to have the attention of the defence called to the principal points in the evidence for the prosecution which told against them, with the result that the appellants had to take 'a shot in the dark', as it were, without having the benefit of knowing the facts or the law which weighed on the mind of the court when concluding that there was a case to answer.
>
> It is a clear and widely known requirement of s 257(i) of the Code that in a trial in the subordinate courts, if, and when, the court calls upon the defence of an unrepresented accused, it shall inform him of his right to give evidence and, if he so elects, to call his attention to the principal points in the evidence for the prosecution which tell against him so that he might have the fullest opportunity of explaining them.
>
> An omission to comply with this requirement, which has occasioned a miscarriage of justice, will lead to the conviction being quashed (see *Shaari v PP*).

> The present appeals are concerned with trials in the High Court in respect of which there is no provision equivalent to s 257(i) of the Code. *But, more importantly, the appellants were both represented by experienced counsel, neither of whom had applied to the court to state its reasons for calling for the defence, no doubt because those reasons must have been self-evident to them. Had such an application been made, it would have had to be considered on its merits and the court would then have had to exercise its own discretion in deciding whether or not to accede to it.*
>
> Here, the record provided shows no trace of either appellant having suffered any prejudice by reason of the judge's omission to explain the principal points in the evidence for the prosecution which told against the appellants. We must therefore hold that there is no substance in this ground of appeal. (Emphasis added.)

[2783]There are two other concerns. First, it would, I think, encourage untold incongruity in our criminal procedure if a trial judge is bound by his specific findings (whether a complete judgment or a summary) on the prosecution evidence when calling for the defence of an accused should a pronouncement is made, but is not if none is made.

[2784]Secondly, of greater concern to the criminal justice system and the integrity of a fair trial, must be that in the situation when a pronouncement of such prima facie findings is made, the trial judge would at the end of the trial, be constrained from according greater weight to a specific prosecution evidence which he did not previously do in his prima facie findings, even though he now thinks that that evidence, in light of the defence evidence, would serve to fortify the case of the prosecution further. This also violates the requirement that consideration must be made on all the evidence of the case. It is fundamentally wrong for the remit of the judicial responsibility prescribed under s 182A to be made to be dependent on whether or not a pronouncement is made of the prima facie findings on the evidence at the end of the prosecution's case.

[2785]As such, the proposition of the defence that it is only required to rebut or explain the prima facie findings in order to earn an acquittal, instead of the whole of the prosecution case, is flawed and misconceived. I reiterate that at the conclusion of the trial, the court must evaluate all the evidence before it in order to find whether the prosecution has proven its case beyond reasonable doubt. The emphasis here, again, is the evaluation all the evidence before it, and not the specific prima facie findings of the trial judge as contended by the defence.

[2786]The law mandates the trial judge to test and measure the accused's explanation as elucidated from his own and the testimony of other defence witnesses, against the evidence already established by the prosecution at the close of its case, without reviewing his findings of fact on such evidence. This was recently affirmed by the Court of Appeal in *Karnam Singh a/l Gubakhus*

Singh & Ors v Public Prosecutor [2019] 2 MLJ 480; [2018] 1 LNS 1762 where the following was made express:

> [30] This does not mean, however, that the accused has a legal duty to prove his case. Unless any presumption of law applies against him to prove any particular fact which forms an essential ingredient of the offence, he has no duty to prove or to disprove anything. All that he needs to do in order to succeed in his defence is to discharge his evidential burden of merely to cast a reasonable doubt in the court's mind as to his guilt. However, the doubt must be a real and reasonable doubt and not just any doubt conjured up to deflect the course of justice.
>
> [31] In deciding whether the accused has succeeded in casting a reasonable doubt in the prosecution's case, *the trial judge must consider all the evidence adduced.For this purpose, he must not focus his mind only to the explanation given by the accused and close his mind to the evidence adduced by the prosecution.*
>
> [32] *The law requires the trial judge to test the accused's explanation against and in the light of the evidence already established by the prosecution at the close of its case, without reviewing his findings of fact on such evidence. This is what s 182A(1) of the CPC means* when it provides:
>
> (1) At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.
>
> [33] The reason why the trial judge must keep the prosecution evidence in mind when considering whether the defence explanation has cast a reasonable doubt in the prosecution case is not hard to understand. This is because in finding that a prima facie case had been established against the accused at the close of the prosecution case, the trial judge had subjected the prosecution evidence to a maximum evaluation as required by law and had found the witnesses to be credible witnesses. Therefore, the strength of the evidence must have been such that if unrebutted or unexplained would warrant the accused's conviction. (Emphasis added.)

[2787]It was also clearly enunciated by the Federal Court in *Md Zainudin bin Raujan v Public Prosecutor* [2013] 3 MLJ 773; [2013] 4 CLJ 21 that where defence is called, following the leading case of *Mat v Public Prosecutor* [1963] 1 MLJ 263; [1963] 1 LNS 82, the duty of the trial judge is not to determine which story is to be believed, but whether the evidence of the accused raises a reasonable doubt as to the truth of the prosecution evidence or as to the accused's guilt, even where the court is not inclined to accept all that the accused has said. It was stated:

> [59] *At the conclusion of the trial, s 182A of the Criminal Procedure Code imposes a duty on the trial court to consider all the evidence adduced before it and to decide whether the prosecution has proved its case beyond reasonable doubt. The defence of the accused must be considered in the totality of the evidence adduced by the prosecution, as well as in the light of the well-established principles enunciated in Mat v PP* [1963] 1 MLJ 263; [1963] 1 LNS 82 with regard to the approach to be taken in evaluating the evidence of the defence. In *Mohamed Yatin Abu Bakar v PP* [1950] 16 MLJ 57; [1949] 1

LNS 50 Spenser-Wilkinson J, at 59, opined:

> In an ordinary case, where no special burden of proof or explanation is by law cast upon the accused, his position is more favourable than it is in those cases where the law presumes something against him. The principle laid down in the recent English cases, particularly *Mancini v Director of Public Prosecutions* appears to me to be that, where no special onus is cast by law upon the accused, then, if his story has the effect of raising a reasonable doubt as to the truth of the prosecution, case, he is entitled to an acquittal; and this is the 'ordinary rule' which is referred to in the passage above quoted from *Rex v Garth*. In this country, at the close of the case for the prosecution the Court will not call upon the accused for his defence unless the evidence of the prosecution witnesses is, in the first instance, believed. *If, when called upon for his defence the accused gives evidence, then the question is, not which story is to be believed, but whether, even if the Court is not inclined to accept all that the accused has said, his evidence does not raise a reasonable doubt as to the truth of the prosecution evidence or as to the accused's guilt*. (Emphasis added.)

[2788]For clarity, I emphasise that the 'duty' on the defence to rebut the existence of 'facts' refers to the evidence adduced by the prosecution as a whole and not limited to those which the court found to exist in its prima facie findings. As a conclusion to the issues, it is patent that given the provisions of s 182A of the CPC and as clarified by various case-law authorities, the defence upon it being called needs only raise a reasonable doubt on the prosecution case as a whole, and not a reasonable doubt on the prima facie findings of facts by the trial judge at the close of the prosecution case as contended by the defence.

[2789]Neither is it true for the defence to contend that the prosecution in the course of the cross-examination of the accused had raised new versions of the prosecution's case which departed from the prima facie case as ruled by this court. The defence also submitted that the versions which allegedly departed and contradicted the prima facie case are sufficient to negate the same and raise reasonable doubt on the prosecution's case.

[2790]The defence spent one whole day submitting on this and the related issue that the prosecution cannot depart from prima facie case or attempt to improve its case thereafter. It argued that the prosecution case cannot be improved or supplemented beyond prima facie case. Further the prosecution case cannot be made based on facts and circumstances introduced in the defence case and that any lacuna in the prosecution's case cannot be filled through admissions of the accused in his examination. The defence emphasised that the veracity of the defence case or evidence of the defence witnesses is not proof the prosecution case. Any new facts or matters arising from the cross-examination of the accused, said by the prosecution to be directed towards testing credibility and veracity under s 146 of the Evidence Act 1950, are 'irrelevant' to the facts in dispute under s 182A of the CPC and are limited

only to the determination whether the accused can be believed on his answers.

[2791]These points are an important contention by the defence. Other than its submission that the prosecution cannot depart from the prima facie findings, which as I have shown to be misconceived, on the contention that the prosecution cannot improve its case thereafter, the overall submissions by the defence on the exposition of the law in this area, given the principles enunciated in the case-law authorities cited by the defence are not inaccurate. However, in my view, the manner in which the defence submitted how these principles should be applied to the instant case is not without flaws.

[2792]It is undeniable that any prosecution must stand and fall on the evidence as it stood at the close of the prosecution's case which was adduced by the prosecution through the prosecution witnesses. The prosecution cannot seek to fill any lacunae or improve or supplement its case thereafter. For emphasis, I repeat that as early as in the case of *Public Prosecutor v R Balasubramaniam* [1948] MLJ 119; [1947] 1 LNS 79, concerning a charge of falsifying an account book under s 477 of the Penal Code, Callow J held the following:

> But does the evidence for the prosecution point irresistibly to wilful fraud? The fact that this book is incorrect, ill-kept or misleading is not enough; there must be conscious determination to defraud as distinguished from ignorant incompetency (5th Ed *Gour* p 1615). It is a question of fact for me to decide on the evidence before me; I am unable to allow the prosecution to attempt to supplement, improve or confirm what may be now a possible though doubtful case by whatever can be elicited from the defence. The Crown case rests at the close of the prosecution.

[2793]In similar vein, the Court of Appeal in *Lim Hock Boon v Public Prosecutor* [2007] 1 MLJ 46; [2007] 4 CLJ 114 held that it would constitute an infringement of fundamental procedural fairness if the prosecution, after having closed its case on the basis of reliance on the statutory presumption of trafficking under s 37(da) of the Dangerous Drugs Act 1952 then decided to subsequently run its case on the basis of the general definition of trafficking under s 2 of the same Act. Gopal Sri Ram JCA (as he then was) stated:

> [17] The principle to be extracted from *Chia Leong Foo* is that once the prosecution elects to rely on one of the statutory presumptions in s 37 of the Act, it cannot at a later stage of the trial seek to rely on the very general definition of s 2 of the Act. That is exactly the position here. Throughout its case, the prosecution proceeded on the basis that it was relying on s 37(da). The accused also presented his case along the lines that the prosecution was relying purely on s 37(da) of the Act. That much is clear from the appeal record. To resort to the wide and untrammelled definition in s 2 of the Act at the end of the case, being quite ineffective as a matter of law, would be unfair and unjust to the accused.

[2794] Yet another facet to the rule against the prosecution improving its case is found in a more recent Court of Appeal decision in the case of *Romi bin Ali v Public Prosecutor* [2018] 6 MLJ 123; [2017] 6 CLJ 652 where it was ruled that the findings made by the High Court without any factual foundation was a misdirection as it amounted to filling a material gap in the prosecution's case created by the insufficient evidence led by the prosecution witnesses. In delivering the judgment of the court, His Lordship Abang Iskandar JCA (now CJ (Sabah and Sarawak)) held instructively as follows:

> [31] So, without the erroneous finding by the learned HCJ in para 61 of her grounds of judgment, the charge for trafficking against the appellant could not stand, in law. Such a finding was highly prejudicial against the appellant because it was made without any factual foundation. It was a clear misdirection of a critical nature on the part of the learned HCJ. It was akin to importing 'evidence' which was otherwise, not before the court. It was unfair against the appellant as it amounted to filling in a material gap in the prosecution case which was created by the insufficient evidence led by the prosecution witnesses.
>
> [32] As such, on the face of the available evidence led in this trial, the conviction for trafficking against the appellant under s 39B(1)(a) of the DDA 1952 could not, in all fairness, be sustained. However strong the court may feel towards the outcome of a case, one way or the other, in the penultimate exercise of judicial power, it must be guided only by the available evidence that has been led before it and to hence direct its mind accordingly. Nothing else matters. In the Federal Court case of *Sia Soon Suan v Public Prosecutor* [1966] 1 MLJ 116 learned Justice Ong Hock Thye FJ had occasion to say at p 118 the following:
>
> > ... the requirements of strict proof in a criminal case cannot be relaxed to bridge any material gap in the prosecution evidence. Irrespective of whether the court is otherwise convinced in his own mind of the guilt or innocence of an accused, its decision must be based on the evidence adduced and nothing else ...

[2795] The question to be asked in this instant case before me, however, is in what fashion do these principles apply, if at all. For example, in respect of the manner or cause of the RM42m being issued out of SRC and then through GMSB to IPSB, and subsequently from IPSB into Accounts 880 and 906 belonging to the accused, the defence observed that the prosecution at the close of its case argued that the accused dishonestly misappropriated RM42m as part of his scheme from SRC through transit accounts. The RM42m transaction was carried out on behalf of the accused by Nik Faisal who signed instruction letters together with PW42. Nik Faisal, as the mandate holder of the accused, and signatory of SRC enabled him to misappropriate monies of SRC for the accused.

[2796] At the end of the trial, however, the defence contended that the prosecution raised new issues or adopted positions inconsistent with its case at the close of the prosecution. Thus, the prosecution contended that Jho Low was instrumental in causing the transfer of funds from SRC into the three

personal accounts of the accused to ensure sufficiency of funds as part of his bank-rolling activities. The defence thus argued that this represents a departure from the prosecution's case which originally was that the accused misappropriated RM42m as agent of SRC to now the RM42m instead being transacted as part of conspiracy through the acts of others.

[2797]I fail to see how this equates to a departure of the prosecution's case. The basic premise is the accused as a Director of SRC (as defined under s 402A of the Penal Code or as its shadow director) who was entrusted with dominion over the property of SRC had caused the transfer of the RM42m from SRC into his personal accounts in Account 880 and Account 906. That is the constant and it remains unchanged.

[2798]The transfers from SRC to GMSB, and from GMSB to IPSB, were put into effect by the action of Nik Faisal, a Director and authorised signatory of the company, with a fellow director, PW42 who followed the request of the former, by way of the instructions to the bank, issued by them on behalf of SRC and GMSB, of which they were common directors. PW39 and PW42 stated that Nik Faisal was the link person between the Directors of SRC and the accused, who as the Prime Minister, and Finance Minister wielded overarching powers over the company given the authority reposed in these positions by the M&A and by virtue of MOF Inc being the sole shareholder of SRC. Nik Faisal, at the same time, also performed the role as the mandate holder for the personal bank accounts of the accused, including Accounts 880 and 906 stated in the relevant charges against the accused.

[2799]The late Datuk Azlin Alias, the principal private secretary of the Prime Minister at the time, provided accounts details to PW49 for her to convey to PW37 of IPSB to move and transfer the relevant portions of the funds in IPSB that eventually made up the RM42m found in the personal accounts of the accused on 26 December 2014 and 10 February 2015 as specified in the relevant CBT and money laundering charges. In addition to being the principal private secretary, Datuk Azlin was also a member of the Board of Trustees of YR1M, the principal funder for IPSB, where the foundation was then chaired by the accused as the Prime Minister, and whose CEO was PW49. On top of this, the defence statement of the accused which was issued prior to the commencement of trial under s 62 of the MACC Act already categorically stated that given the accused's busy schedules, the account management of his personal accounts had been 'reasonably delegated' to Nik Faisal and Datuk Azlin.

[2800]The involvement of Jho Low in matters concerning the personal accounts of the accused was also confirmed by Joanna Yu (PW54) when the evidence of BBM conversations (P578) were shown to her. One example is the

conversation between Joanna Yu (PW54) and Jho Low as recorded therein, on the incoming RM27m into Account 880 of the accused in early July 2014 from PBSB. This is already part of the prosecution case. The evidence of PW50 and PW57 too support the narrative on the involvement of Jho Low.

[2801]The testimony of the accused, however, further confirms the role of Jho Low in the management of the accounts of the accused, on top of the involvement of Nik Faisal and Datuk Azlin. The accused testified that Jho Low's main responsibility was to ensure sufficiency of funds in these accounts so that the accused could continue issuing personal cheques out of these accounts. He was also the conduit for the alleged Arab donation sources. This is still very much consistent with the case of the prosecution earlier that the accused caused the transfers through Nik Faisal and Datuk Azlin. The evidence of the accused that Jho Low was primarily involved in the management of the personal accounts of the accused is also consistent with the evidence in the BBM chats (P578). The prosecution's submission that Jho Low was involved, if not instrumental, in causing the RM42m funds from SRC to the personal accounts of the accused as part of the task of ensuring sufficiency of funds in these accounts cannot therefore be said to be a departure or improvement from the prosecution's case at the close of prosecution.

[2802]Nor can it be asserted that the prosecution's case has now gone outside of the evidence of prosecution witnesses' testimony, such as Joanna Yu (PW54) and the investigating officer (PW57). Both acknowledged the involvement of Jho Low in the management of the personal accounts of the accused. And any suggestion that the prosecution had introduced new case theories which were outside the court's prima facie findings, or that the cross-examination was undertaken to elicit new facts beyond prima facie case, or even that the cross-examination was undertaken in contravention of s 138(2) of the Evidence Act 1950 on that cross-examination must relate to relevant facts or s 143 of the same Act on when leading questions may be asked in cross-examination, is plainly unmeritorious.

[2803]Similarly, the defence also argued that the prosecution had sought to improve its case or advance another at the end of the trial in respect of the issue of the purpose of the RM42m transacted from SRC into Accounts 880 and 906. In essence earlier, the prosecution seemed to contend that the RM42m was gratification obtained as part of a scheme, in furtherance of a continuous plot to misappropriate monies of SRC.

[2804]The defence then argued that the case of the prosecution took a turn during the cross-examination of the accused where the said misappropriation now was claimed by the prosecution to have been committed through conspiracy with others, and that it was actually a misappropriation committed

by others to put money into the accused's accounts as and when needed, or that the obtainment of gratification by the accused was for his involvement at the Cabinet meetings which approved the two guarantees as part of a continuous plot.

[2805]Again, I do not see any merit in this line of argument. The prosecution was, in cross-examination of the accused, able to get the accused to testify the Jho Low was periodically pumping money into the accounts as and when the accused needed funds to issue cheques since it was Jho Low's task, including that of Nik Faisal and Datuk Azlin, as assigned by the accused to ensure precisely just that. This is also consistent with the prosecution's case that the misappropriation is part of a continuous plot for the personal gain of the accused.

[2806]It is true that in the cross-examination of the accused, the prosecution did suggest to the accused that, for example, Jho Law remitted funds into the personal accounts of the accused with the RM42m from SRC as well as from other companies, that the accused diverted funds of SRC into his own accounts after the alleged Arab donation monies ran out, and that the accused had taken loans from PPC and PBSB which necessitated him paying back the RM32m on 29 December 2014, and that the RM10m deposited on 10 February 2015 was to regularise the accounts in overdrawn positions and for the accused to utilise, and even that Datuk Azlin had carried out transfers of RM42m in order to regularise the accounts or in anticipation of the accused issuing further cheques or to ensure adequacy of funds in the accounts at all times.

[2807]I do not agree that in the course of cross-examining the accused and his witnesses, the prosecution had diverted from its case. The suggestions put to the accused by the prosecution during cross-examination was, in any event, never clearly objected to as a deviation from the prosecution case.

[2808]In any event, it is well-established that under s 146(a) and (c) of the Evidence Act 1950, the prosecution was entitled to ask any questions which tend to test the accuracy, veracity and credibility of the accused as well as to shake his credit by injuring his character.

[2809]Reference to two case authorities cited by the prosecution is, in my view, in this regard apposite. Thus the Court of Appeal in *Hari Bahadur Ghale v Public Prosecutor* [2011] 5 MLJ 785; [2012] 2 CLJ 1006 stated, in the judgment of Malik Ishak JCA, as follows:

> [80] The law journals are replete with authorities in regard to the failure to cross-examine a witness. Cross-examination is usually done with a view to adducing further evidence in respect of an issue or with a view to contradicting the evidence-in-chief of the witness concerned. The cross-examiner will launch an

attack in order to impugn the general credibility of the witness. Cross-examination of an issue may take the form of retracing the evidence which a witness has given with a view to placing a different complexion or emphasis or interpretation on it; or the cross-examiner may be bold and may take the witness into new unchartered areas on which the witness has not previously testified but on which the witness's evidence may be favourable to the cross-examining party.

[81] While cross-examination as to credit is purely based on the skill and experience of the cross-examiner. The cross-examiner may trace the evidence in such a way that the witness's observation, recollection, perception and judgment may be challenged. In addition to this, the cross-examiner may even seek to show that the witness is not someone who can safely be believed on oath.

[2810]The second is the judicial pronouncement of the Supreme Court of India in the case of *State of UP v Lakhmi* [1998] 4 SCC 336 which stated in clear fashion the following observation:

... The need of law for examining the accused with reference to incriminating circumstances appearing against him in prosecution evidence is not for observance of a ritual in a trial, nor is it a mere formality. It has a salutary purpose. It enables the court to be apprised of what the indicted person has to say about the circumstances pitted against him by the prosecution. Answers to the questions may sometimes be flat denial or outright repudiation of those circumstances. In certain cases, the accused would offer some explanations to incriminative circumstances. In very rare instances the accused may even admit or own incriminating circumstances adduced against him, perhaps for the purpose of adopting legally recognised defences. In all such cases the court gets the advantage of knowing his version about those aspects and it helps the court to effectively appreciate and evaluate the evidence in the case. If an accused admits any incriminating circumstance appearing in evidence against him there is no warrant that those admissions should altogether be ignored merely on the ground that such admissions were advanced as a defence strategy.

[2811]Further, I am in agreement with the prosecution that there was no deviation in the prosecution's case. In the first place, mere suggestions during cross-examination are means to discover the truth. It cannot amount to evidence nor can it substitute evidence. In the Court of Appeal decision in the case of *Samsuri bin Tumin lwn Pendakwa Raya* [2011] 6 MLJ 358; [2011] 1 LNS 834 which affirmed that suggestions in cross-examination do not amount to evidence, it was held thus:

[13] Di dalam kes *Emperor v Kaimuddin Sheikh* AIR 1932 Cal 375, dinyatakan:

Mere suggestions by a pleader or advocate for the accused do not amount to evidence of the fact suggested, unless they are either partly or wholly accepted by the witness for the prosecution.

[14] Prinsip di atas telah juga dipakai di dalam kes *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1, dalam mana telah diputuskan antara lain:

A suggestion in cross-examination can only be indicative of the case put forward or the stand taken by the party on whose behalf the cross-examination is being conducted, but to no extent whatsoever can it be a substitute for evidence if it is clearly repudiated by the witness to whom it is made.

[2812]In another case, that is *Mirza Murtala v Public Prosecutor* [2010] 5 MLJ 616; [2010] 4 CLJ 150 the court further reaffirmed the well-established principle of law that suggestions made to the prosecution's witnesses at the prosecution's stage by the defence are not evidence and remains mere suggestions (see also another similar observation by the Court of Appeal in *Ogujiofor Frank Chike v Public Prosecutor* [2015] 2 MLJ 100; [2014] 1 LNS 720).

[2813]As such, suggestions or questions during cross-examination cannot be deemed as facts because they have not been proved in accordance to the requirement of the law, more so when such suggestions were rejected by the witness to whom the suggestions were put.

[2814]In the instant case before me, the accused had denied all suggestions and in particular his knowledge of the transfer of RM42m from SRC to his private accounts. However, the accused plainly admitted that Jho Low, Nik Faisal and Dato' Azlin were tasked to transfer funds into his accounts to ensure that cheques issued out of these accounts by the accused would not be dishonoured. The suggestions, I agree, were meant to test the credibility and veracity of the accused's evidence, and does not run afoul with the provisions of the Evidence Act. It is nothing more than a suggestion unless accepted by the accused. It is, therefore, untrue for the defence to contend that the prosecution had diverted from what it alleged to be the prima facie case by introducing new versions that are inconsistent with such prima facie case.

[2815]The crux of the prosecution's case in respect of the element of misappropriation is that the accused had caused the transfer of RM42m into his personal accounts. As such, the cross-examination of the accused was undertaken with the view of corroborating the prosecution's case of the offences committed by the accused, discrediting the defence case that the accused had no knowledge of the commission of the offences charged, obtaining admission that the accused had knowledge of the commission of the offences charged, and testing the veracity or credibility of the defence witnesses including that of the accused.

[2816]Also, it cannot be said that the prosecution had led conflicting versions on a material aspect, striking each other out, rendering the evidence unreliable (see the Supreme Court decision in *Yusoff bin Kassim v Public Prosecutor* [1992] 2 MLJ 183; [1992] 1 LNS 31). Neither is this a situation where the

prosecution is attempting to prove its case based on matters elicited through cross-examination of an accused or other defence witnesses (see the Court of Appeal decision in *Hoh Keh Peng v Public Prosecutor* [1948] 1 MLJ 3b; [1947] 1 LNS 33 and the Australian High Court decision in *Shaw v R* [1952] 85 CLR 365).

[2817]This is because the case of the prosecution has already been established and complete before the accused was examined. There is no basis for the assertion that the prosecution is relying on the testimony of an accused as proof of elements of its case or to cover a lacunae in the evidence in the prosecution's case. In the instant case, the force of the defence evidence is unable to rebut the weight of the prosecution's case. Instead, the evidence adduced at the defence stage is consistent with, supports and confirms the prosecution case.

[2818]The defence referred to this passage from the decision of the High Court in *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705; [2000] 4 CLJ 649 which stated:

> Speaking generally, the prosecution must present completely the evidence that supports the incriminating circumstances upon which it relies to constitute its primary case. A failure to observe this rule is likely to result in the prosecution's being forbidden to introduce further evidence after the accused has presented his defences upon the ground that the prosecution would be splitting its case.

[2819]There is no basis to say that the prosecution in the instant case had attempted to introduce further evidence after the close of its case because it had already presented a complete case at that stage. The suggestion that the prosecution had failed to make out a case and then hoped to repair deficiencies by the cross-examination of the witnesses of the defence is simply misconceived. It is not that the accused would be required to meet a case not evaluated by the court and worst still not anchored on the evidence adduced at the prosecution stage.

[2820]All questions posed to the accused and defence witnesses were never inconsistent with the essence of the prosecution case which is that the accused had caused the transfer of the RM42m from SRC into his Account 880 and Account 906. It sought to corroborate the prosecution case, discredit the defence case that the accused claimed to be unaware of the commission of the offences, obtain admission that in fact he had knowledge of the same and to test the veracity or credibility of the defence witnesses including the accused.

[2821]In finding a prima facie case on all seven charges, this court has performed a maximum evaluation of all evidence adduced at the prosecution stage. The prima facie case and the order for the accused to enter his defence is entirely predicated on that complete case of the prosecution. The question

now, at the end of the trial, is whether the defence evidence is able to cast any reasonable doubt on the case of the prosecution. That is the requirement of the law under s 182A of the CPC.

[2822]It is true that the prosecution case cannot be improved or supplemented after the close of its case. But here that is not the situation. The evidence of the defence witnesses, the accused himself in particular, does indisputably add more details and colour to the case. Yet it does not punch holes in the prosecution case. The evidence of the accused is in fact consistent with the case of the prosecution. Thus whilst the case on the misappropriation is that it was effected by Nik Faisal (being a director with the authorised signatory and the mandate holder for the accused's personal accounts) in issuing the soft copy instructions, the testimony by the defence witnesses such as DW2 accused clearly produced a wider scenario of the possible involvement of others such as Terence Geh, at the behest of Jho Low.

[2823]However, this 'new scenario' does not negate the presence of the role of Nik Faisal. The defence evidence merely provides greater clarity and more colour to the evidence in the prosecution's case. But it does not have the effect of rebutting or explaining the prosecution case. The case of the prosecution remains firmly intact. In any event, the evidence on the involvement of Terence Geh and Jho Low did get elicited during the prosecution stage, especially from the testimony of Joanna Yu (PW54) and the BBM chats (P578). Similarly, the submission of the prosecution at the end of the case that the misappropriation was effected by the accused through the role of the three identified by the accused as being tasked with playing their respective parts in managing the personal accounts of the accused (based on the testimony of the accused himself) does not represent a departure from or improvement on the prosecution's case as established at the end of its case.

[2824]It is not disputed that the prosecution's case is that the accused effected misappropriation through Nik Faisal, who was the former's mandate holder as well as Director of SRC. This 'new' submission where the crime was perpetrated with the assistance of two additional individuals is still consistent with the earlier case of the prosecution. The difference is only in terms of the details which are, in any event, also found in the evidence adduced during the prosecution stage.

[2825]There is thus no issue of a lacuna in the prosecution case as filled through admissions of the accused in his examination. It does not arise at all.

VERDICT ON ALL CHARGES AT THE CONCLUSION OF TRIAL

[2826] In conclusion, after considering all the evidence in this trial pursuant to s 182A of the Criminal Procedure Code, and for the reasons I have stated in this judgment, I find that the prosecution has successfully proven its case beyond reasonable doubt against the accused in respect of the charge for use of position for gratification under s 23 of the MACC Act (P5), the three CBT charges under s 409 of the Penal Code (P9A, P9B and P9C) and the three money laundering charges under s 4(1) of the AMLATFPUAA (P10A, P10B and P10C).

[2827] I therefore find the accused guilty and convict the accused on all seven charges.

MITIGATION AND SENTENCING

Application to defer mitigation and sentencing

[2828]On 28 July 2020, immediately after I pronounced that the accused is guilty and convicted of all seven charges, I invited the learned lead senior counsel to proceed with presenting a plea of mitigation on behalf of the accused. However, he requested that the matter be deferred for a few days to enable the defence to review the summary grounds of the decision I read in court in order to prepare a full mitigation. As such the defence requested that the matter be deferred to the following Monday, 3 August 2020. Learned senior counsel also made it clear that the intentions from his client is for an appeal be made to the Court of Appeal. Learned lead prosecutor expressed doubt that the law allowed for the sentencing process to be deferred but the defence insisted that adjourning sentencing after conviction to a different day is not without precedent. Nevertheless, no case authorities could be produced then. As it was already close to 1pm, I agreed for proceedings to break for lunch, so as also to afford time for parties to procure the relevant authorities and submit further on the said request at 2pm.

[2829]When court resumed at 2pm, learned lead senior counsel highlighted several reported decisions which contain references to the fact that the sentencing of the accused was performed on a different date. These include the followings cases:

(a) *A Dickinson v Public Prosecutor* [1955] 1 MLJ 191; [1954] 1 LNS 1;

(b) *Maung Min Aung & Anor v Public Prosecutor* [2001] 5 MLJ 140; [2001] 5 CLJ 160;

(c) *Public Prosecutor v Rozita bt Mohamad Ali* [2018] 9 MLJ 1; [2018] 9 CLJ 265;

(d) *Lee Weng Tuck & Anor v Public Prosecutor* [1989] 2 MLJ 143; [1989] 2 CLJ 120; [1989] 1 CLJ Rep 75;

(e) *Re Abu Kassim* [1964] 1 MLJ 12; [1963] 1 LNS 108;

(f) *Public Prosecutor v Chin Wai Leong* 42S-75–06 of 2013 (unreported);

(g) *Public Prosecutor v Musdar bin Rusli* [2017] 5 MLJ 628; [2017] 7 CLJ 703;

(h) *Murni bin Hj Mohamed Taha v Public Prosecutor* [1986] 1 MLJ 260;

(i) *Ilham Syarif v Public Prosecutor* [2010] 5 MLJ 382;

(j) *Public Prosecutor v Jamalul Khair* [1985] 1 MLJ 316; [1984] 1 LNS 161; and

(k) *Swander Singh a/l Bawa Singh v Public Prosecutor* [1994] MLJU 268; [1996] 1 CLJ 356.

[2830]The prosecution expressed its objection to the deferment application, but submitted that should I agree to the postponement, which, it was suggested would be a stay of the conviction under s 311 of the CPC, this court could under the said provision impose terms as the court considers reasonable in order to deal with the change in the status of the accused who is now a convict. The defence clarified that it was not asking for a stay under that provision but instead an exercise of judicial discretion for the sentencing be done later.

[2831]I observe that most of the cases referred to by the defence involved accused persons who were most probably already in custody, such as in drug trafficking cases under the Dangerous Drugs Act 1952 ('the DDA') where bail is statutorily prohibited (such as in *Lee Weng Tuck & Anor v Public Prosecutor* [1989] 2 MLJ 143; [1989] 2 CLJ 120; [1989] 1 CLJ Rep 75). For example, where an accused decided to plead guilty to a lesser charge offered by the prosecution under the DDA, the court may after accepting the guilty plea and convicting the accused decide to hear the mitigation for sentencing on a different day because counsel could not prepare the mitigation on the same day the prosecution offered to offer the lesser charge.

[2832]In that situation, even though the accused has become a convicted person, this change in status poses no difficulty because he is already in custody and remains to be so pending sentencing, which would very likely result in jail terms under the DDA in any event. There are also cases involving immigration offences committed by foreigners who again, are usually already detained pending trial (which was probably the case in *Maung Min Aung & Anor v Public Prosecutor* [2001] 5 MLJ 140; [2001] 5 CLJ 160 and *Re Abu Kassim* [1964] 1 MLJ 12; [1963] 1 LNS 108). And the case of *Public Prosecutor v Musdar bin Rusli* [2017] 5 MLJ 628; [2017] 7 CLJ 703 concerns the charge of murder.

[2833] In addition, as importantly, none of the cases actually discussed the legal position or discloses the legal basis for deferring sentencing on a day different from when the conviction is recorded. The cases merely contain references to the fact that conviction and sentencing were pursued on different days, which therefore means that mitigation for sentencing could be done after and not necessarily the same as the conviction date.

[2834] In any event, as pointed out by lead senior counsel, a copy of the Order of the Court of Appeal in the case of *Public Prosecutor v Chin Wai Leong* 42S-75–06 of 2013 (unreported) dated 12 December 2017 allowed the appeal by the prosecution and thus convicted the respondent of one charge under the Banking and Financial Institutions Act 1989 and 61 charges under AMLATFA. Importantly, the order specified that the respondent was to be granted bail pending the hearing for the mitigation for the sentence, which was scheduled for 4 January 2018.

[2835] I as such accept that upon finding an accused guilty and convicting him the courts have the power to postpone sentencing and have it heard on a later date. One source of such authority is s 311 of the CPC which reads as follows:

> 311 Stay of execution pending appeal
>
> Except in the case of a sentence of whipping (the execution of which shall be stayed pending appeal), no appeal shall operate as a stay of execution, but the Court below or a *Judge may stay execution on any* judgment, order, *conviction* or sentence *pending appeal*, on such terms as to security for the payment of any money or the performance or non-performance of any act or the suffering of any punishment ordered by or in the judgment, order, conviction or sentence as to the Court below or to the Judge may seem reasonable. (Emphasis added.)

[2836] The above provision suggests that a stay may even be allowed in respect of the conviction, although none of the cases referred to by the defence actually mentions s 311 of the CPC as the basis for the deferment of the sentencing in those cases.

[2837] It is also observed that a similar provision exists in the Courts of Judicature Act 1964 where s 57 reads as follows:

> 57 Appeal not to operate as stay of execution
>
> (1) Except in the cases mentioned in subsection (3) and section 56A, no appeal shall operate as a stay of execution, but the High Court or the Court of Appeal may stay execution on any judgment, order, conviction or sentence pending appeal on such terms as to security for the payment of any money or the performance or non-performance of any act or the suffering of any punishment ordered by or in the judgment, order, conviction or sentence as to the Court may seem reasonable.

(2) If the appellant is ultimately sentenced to imprisonment, the time during which the execution of the sentence was stayed shall be excluded in computing the term of his sentence unless the Court of Appeal otherwise orders.

(3) In the case of a conviction involving sentence of death or corporal punishment —

(a) the sentence shall not in any case be executed until after the expiration of the time within which notice of appeal may be given under section 51, or any extension of time which may be permitted under section 56; and

(b) if notice is so given the sentence shall not be executed until after the determination of the appeal.

[2838]There is one important point that I must address. Although this was not raised by the defence, one of the cases that drew the attention of this court to is the decision of Augustine Paul J (as he then was) in *Maung Min Aung & Anor v Public Prosecutor* [2001] 5 MLJ 140; [2001] 5 CLJ 160 which held that under s 173(m)(ii) of the CPC a conviction must be recorded only after the plea in mitigation has been made and before sentence is passed. The following passage is relevant:

> ... However, the fact that the court shall find the accused guilty at the end of the trial '... and he may be convicted on it ...' as provided by s 173(m)(ii) means that the recording of a conviction is a separate and distinct exercise after a finding of guilt has already been made. The fact that the power to convict is not automatic following a finding of guilt, by virtue of it being discretionary, supports this view. The discretionary power to convict means that the recording of a conviction must be postponed after a finding of guilt has been made. It is postponed to enable the court to decide whether in fact a conviction must be recorded before imposing sentence. That will bring into focus s 173A of the Criminal Procedure Code under which an order is made without recording a conviction. Thus a conviction must be recorded only after the court is satisfied that the sentence to be imposed warrants a conviction. The court can be so satisfied only after a plea in mitigation has been advanced in order to assess the sentence to be passed, that is to say, whether the sentence is one that must carry with it a conviction. The corollary is that a conviction cannot be recorded at the stage a finding of guilt is made. The word 'convicted' in s 173(m)(ii) thus refers to the wider sense of the meaning of the word 'conviction' in which it is used which is the stage of the final disposal of the case. A conviction must therefore be recorded only after the plea in mitigation has been made and before sentence is passed ...

[2839]Section 173 of the CPC applies to procedures in summary trials by magistrates. However, s 182A, which sets the procedures at the conclusion of the trial at the High Court contains a similar provision, as follows:

> (2) If the Court finds that the prosecution has proved its case beyond reasonable

doubt, the Court shall find the accused guilty and he *may be* convicted on it. (Emphasis added.)

[2840]The question, therefore, is whether in the instant case a conviction should only have been recorded after the court heard the plea in mitigation. My answer is in the negative. This is because the reason why *Maung Min Aung & Anor v Public Prosecutor* ruled that the mitigation plea should precede a conviction is to enable the court to decide whether the sentence is one that must carry with it a conviction. This in turn is on account of s 173A of the CPC which concerns the power of the court to discharge an accused person conditionally or unconditionally without the recording of a conviction even where the offence has been proven, subject to satisfaction of certain conditions.

[2841]It is trite however, as lucidly explained by Abdoolcader J (as he then was) in *Public Prosecutor v Yeong Yin Choy* [1976] 2 MLJ 267; [1976] 1 LNS 119 that the objective of s 173A of the CPC is as follows:

> I would think that the essential difference in the application of the provisions of s 294 and s 173A of the Code is that the latter is normally intended to be utilised in cases of minor import and calling for exceptionally mild treatment affecting adult and youthful offenders alike where the nature of the offence, the extenuating circumstances of the case and factors peculiar to the offender in question justify and perhaps even require that no conviction be recorded against him, so that although he is either admonished or cautioned or discharged conditionally as provided therein there remains no blemish or stain against him by reason of a conviction being recorded ...

[2842]The complete answer as to why this s 173A of the CPC has no application or relevance to the instant case is found in s 173A(8) which states that s 173A shall not apply if the offender is charged with a serious offence. Section 52B of the Penal Code states that a 'serious offence' denotes an offence punishable with imprisonment for a term of ten years or more.

[2843]Even before the introduction of this provision in sub-para (8), the courts were already generally disinclined to invoke the same in cases of serious crimes. Relevant to the instant case, the High Court in the case of *Pendakwa Raya lwn Dato' Seri Mohd Khir bin Toyo* [2012] 5 MLJ 272; [2012] 3 CLJ 885; [2012] 3 AMR 66 who found the former Menteri Besar of Selangor guilty of a corruption offence under s 165 of the Penal Code considered s 173A of the CPC but ruled that a custodial sentence was appropriate given the seriousness of the offence committed by a person who occupied the top executive position in the state government.

[2844]It needs no reminding that the accused in the instant case, a former Prime Minister of the country was found guilty of seven charges under the

MACC Act, the Penal Code and the AMLATFPUAA, all of which are serious offences. The matter is, in any event, academic because even without applying s 173A(8), the finding of guilt on these charges would not have attracted the application of s 173A of the CPC given the gravity of the charges. The conviction upon the finding of the guilt of the accused on the seven charges does not therefore have to be adjourned to enable a plea of mitigation to be heard first.

[2845]Reverting to the issue whether this court should have nevertheless deferred the mitigation to the following week upon the conviction of the accused, in my view, whilst cognisant of the provisions of s 311 which could be applied for such purpose, the general rule should be that the courts should as far as possible proceed to hear the mitigation and sentence the accused immediately upon conviction. First, this would provide certainty to the status of the accused. Once convicted, the accused becomes a convict. It is desirable for the sentencing to be pursued on the same day so that only upon the sentence being pronounced that the accused (now a convicted person) would apply for a stay of execution of the sentence pending appeal. If successful, where special circumstances are established for the court to grant a stay, bail will be allowed and all processes of the accused (convict) at the level of the trial court would thus be complete.

[2846]I should emphasise that a trial judge is not functus officio until he has passed sentence. Gunn Chit Tuan J in *Public Prosecutor v Jamalul Khair* [1985] 1 MLJ 316; [1984] 1 LNS 161 observed, albeit in a case where the accused pleaded guilty (which should, given the context, similarly apply to a finding of guilt by the court), as follows:

> ... In the words of Lord Reid it 'cannot be right because every day accused persons who begin by pleading not guilty change their plea to guilty after the plea of not guilty has been recorded and the trial has begun, and that raises no technical difficulty'. It follows that if a court upon all the facts before it thinks it is proper to accept a plea of guilty then the court may permit that plea to be withdrawn and a plea of not guilty accepted at a later stage up to sentence, that is, until final adjudication. I therefore considered that the said President was not functus officio in this case until she has passed a sentence or has otherwise finally adjudicated the matter. In the circumstances there was no need for any order of revision, and I directed that the learned president should proceed to try the case.

[2847]Secondly, if the sentencing process is deferred to another date after conviction, which as I have said can only be justified on the basis of s 311 of the CPC, this would in all likelihood mean that the convict would have to be released on bail. The bail for non-bailable offences like framed in the seven charges which was first granted upon the accused being charged is for the purpose of ensuring attendance at the trial. It is also predicated on the respect for the well-entrenched principle of presumption of innocence until proven

guilty. As such, once the court pronounces the guilty verdict (and convicts the accused), the purpose of the bail comes to an end. The criminal justice process at that stage requires the convict to be now sentenced, and pending that he should be placed in custody. Section 183 of the CPC after all, states that if an accused is convicted, the court shall pass sentence according to law.

[2848]Now, if for some reason the sentencing cannot be pursued upon conviction, and the convict wishes not to remain in custody, another bail arrangement must be formalised, this time, as stated, under s 311 of the CPC. Yet the considerations for the granting of bail in such a situation are not immediately apparent. This is because the jurisprudence on bail in this country is almost entirely in two situations only — upon being charged, and after being sentenced, pending appeal. There appears to be no case-law authority on the factors to be taken into account in the exercise of judicial discretion whether or not to allow bail (and to grant a stay of conviction) after conviction but before the sentencing process which is deferred to another date.

[2849]As such, as a general rule, once the court determines the guilt of an accused and proceeds to convict him, or in subordinate courts, finds him guilty and hear the mitigation before deciding to convict or not (in view of s 173A of the CPC), the proceedings against the accused should be pursued with the mitigation process on the same day. Adjournments for a few hours may reasonably be allowed for final preparation for the mitigation process by parties but the same and the sentencing should rightfully be on the same day. Only exceptionally good reasons should warrant the court to defer the mitigation and sentencing to another date by staying the conviction under s 311 of the CPC.

[2850]Examples include, if it is deemed necessary, to call for a probation officer's report to establish the background of the accused who is below the age of 21 about to be sentenced (such as in the case of *Lian Kian Boon v Public Prosecutor* [1991] 1 MLJ 51; [1990] 2 CLJ 799; [1990] 2 CLJ Rep 350) or if there is a request by the victim of the crime or the victim's family, for the court to call upon them to make a statement on the impact of the offence on the victim or his family under s 173(m)(ii) and s 183A of the CPC.

[2851]Plainly, these two situations are irrelevant to the instant case to justify any deferment.

[2852]The reasons proffered by lead senior counsel for the deferment is to enable the team to study the summary of my grounds of decision as delivered in open court so that the defence could prepare a comprehensive mitigation that would also include matters relating to the involvement of the accused in the commission of the offences.

[2853] This, in my view, is neither exceptional nor a valid reason to justify the deferment as applied by the defence. It is common that mitigation would immediately follow the pronouncement of a guilty verdict. Defence lawyers and prosecutors would ordinarily have already prepared the respective submissions on mitigating and aggravating factors, as the date of the verdict would have been informed several weeks prior. In the instant case, at the close of the oral submissions session on 5 June 2020, I said that the verdict would be delivered on 28 July 2020. That is more than a seven week hiatus. Surely, this is a more than sufficient lead time for a very efficient and large defence team to prepare the mitigation. This would include, as suggested by the lead senior counsel, even the possibility of summoning witnesses to testify in the mitigation.

[2854] Secondly, it is basic that in any verdict the decision could go either way, and in a trial of seven charges, the probability that at least one of the charges may be found to be proven beyond reasonable doubt thus necessitating a mitigation plea is one that any defence counsel must certainly have been prepared for.

[2855] Thirdly, it not uncommon for trial courts to deliver the verdict without grounds for the decision. In the event of a guilty verdict, it means in essence that the defence has failed to raise any reasonable doubt on the prosecution's case. The defence is fully aware of the prosecution's case. Any allusion to the crime and the involvement of the accused in the commission of the crime in the plea of mitigation would primarily need only be predicated on and referenced to the prosecution case. As such, when trial courts do deliver certain reasons for the decision to convict, it is neither convincing nor valid for the defence to assert that the team needs time to study the reasons.

[2856] Fourthly, the summary of the grounds that I read out in open court, for slightly over two hours, in based on the totality of the evidence in this case, as presented by the prosecution and the defence, which parties are not unfamiliar with. This is no compelling necessity for the defence requiring a few days to digest the same for purposes of preparing a mitigation speech.

[2857] Fifthly, the reason cited by lead senior counsel, that it is more important for matters pertaining to the offences be included in the mitigation than that of the antecedents of the accused too is unconvincing for the reasons stated above. At the same time, it is also stated by the defence that there were certain areas that the defence would not include in the mitigation as they would potentially prejudice the appeal process. In other words, a complete mitigation cannot be made because the accused intends to appeal. This, in my mind, suggests that the defence was thinking more of including matters which are more relevant to the appeal process than to the mitigation process.

[2858]Sixthly, the defence said my findings included novel matters which required more time to prepare in respect of which lead defence counsel submitted covered the public and official role of the accused, the control by the Board of SRC and the findings of the former attorney general which previously cleared the accused of any criminal wrongdoings. Again, in my view, there should be nothing about the role of the accused vis a vis the commission of the offences that the defence could not address in the mitigation whilst the more weighty issues on these matters relate more to the appeal process.

[2859]In light of these considerations, I am of the view that the defence has failed to show any exceptionally good reason to justify this court to stay the conviction under s 311 or in any manner exercise its discretion to order the deferment of the mitigation and sentencing process. The accused in addition still has the right to apply for a stay of execution. The request for more time to study the summary grounds of decision is as such not a valid, let alone exceptionally good, justification. It is therefore dismissed.

The sentencing process

Mitigation by the defence

[2860]Upon my dismissal of the defence's application to defer the mitigation, I requested defence to present the mitigation for the accused.

[2861]The first point expressed by lead senior counsel was that the defence was crippled and hampered from preparing an effective and full mitigation for the accused. The defence submitted that the team were not able to take the fullest instructions from the accused. The defence also repeated that a full mitigation could not be submitted because first, the detailed findings could not be studied and secondly, an appeal would be made, such that certain facts, according to the defence, would not be addressed to avoid compromising the appeal.

[2862]Nevertheless, within the claim of such constraints, the defence began the plea of mitigation proper by highlighting the background and achievements of the accused as a politician. This is, of course, well documented.

[2863]Although not mentioned by the defence, the accused is the eldest son of the country's second Prime Minister.

[2864]The accused is one of the Four Noblemen in the Royal Court of the State of Pahang. The accused graduated in Industrial Economics from the University of Nottingham. He became the youngest Deputy Minister when appointed as the Deputy Minister of Energy, Telecommunications and Post at

A the age of 25, and was subsequently made the youngest Chief Minister of a state when appointed as the Menteri Besar of Pahang in 1982 at the age of 29. He was made a full Cabinet minister in 1986 as the Minister of Culture, Youth and Sports. The accused held various ministerial portfolios in the period thereafter and in 2004 he ascended to the position of the Deputy Prime Minister. In 2008 B as the Deputy Prime Minister, he was also appointed as the Finance Minister.

[2865]In 2009, the accused became the sixth Prime Minister of Malaysia, and relinquished office following the loss of the ruling coalition party that he led in the country's 14th General Elections on 9 May 2018. He resigned as the C President of UMNO and Chairman of BN on 12 May 2018. Since 9 July 2019, the accused is the Chairman of the BN Advisory Board.

[2866]The accused does not have any record of any traffic summons, let alone any conviction for any offence. He had extended his full cooperation to the D authorities since his involvement in the 1MDB controversy became public in 2015. He had given three statements to the MACC and a few others to the RMP. He continued to cooperate in 2018 even though the previous attorney general had already cleared him of any criminal wrongdoings in January 2016. During his tenure as the Prime Minister, the accused had agreed to the setting E up of the Public Accounts Committee ('PAC'), a select committee of the House of Representatives in the Parliament of Malaysia to inquire into the 1MDB matter and there was never any allegation that he had tampered with any of the witnesses summoned by the PAC.

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[2867]On SRC, it was stated that the Cabinet and EPU never said that its formation was a bad idea, especially since it was in line with the 10th Malaysia Plan and the National Energy Policy. The accused was probably perceived as very keen and acted swiftly but that was due to the objectives of SRC. But the G accused never had any improper motives.

[2868]Learned lead senior counsel submitted that the accused was never involved as a member of the Board of Directors and never had such experience. In this case, he had relied on the Directors of SRC whom he had expected to act H professionally and he had a genuine belief in their expertise and experience. He did not micro-manage SRC. His fault here was being too trusting on the Directors of SRC who really ought to be running the company.

[2869]This is also, according to the defence, the first time the concept of I shadow director is used in a criminal proceedings and is thus a ground for mitigation. It is also repeated that the lack of knowledge of the accused was supported by the findings of the former attorney general (DW14) and DW17 and queried how much of the guilty knowledge could be attributed to the accused.

[2870]Another serious mitigation factor is said to be the vexed question on the proper conduct of public servant, and the limits on the opinions that the Prime Minister and Finance Minister could express.

[2871]It was also emphasised that the criminal justice system must function to make everyone, including an accused, feel that justice is done. In this case, however, the accused felt that he was the only one singled out whilst little attempt was made by the investigative and prosecutorial agencies to bring others such as Jho Low, Nik Faisal and PW42 to justice. The accused thus felt victimised.

[2872]In respect of the matters relevant to the predicate offences of CBT and abuse of position, the defence submitted that not a single process was skipped or disregarded for approval. This indicates the accused's respect for due process.

[2873]The accused had also undergone severe punishment and has been charged and made to answer in four different courts. He was hounded by the Inland Revenue Board and ordered to pay an unbelievable sum of RM1.69 billion in tax. The accused considers this as oppressive and to have been purposely undertaken.

[2874]Learned lead senior counsel also emphasised that a preponderance of the utilisation of the impugned funds (which I understand to be related to both the entire period from 2011–2015 as well as the period with coincided which the charges in late 2014 to early 2015) or some 99% was not for personal use. It is asserted that even that little expenditure seen to be for personal purposes were in fact for the public benefit and not for personal use. The home renovation expenses of about RM200,000 was thus more to accommodate members of the public who attended events organised at his private residence. The credit card purchase at Italy was to reciprocate expensive gifts given to him by a foreign royal dignitary. The defence also emphasised that the accused had in fact returned USD620m to the sender in 2013.

[2875]In respect of sentencing, the defence argued that the offences for which the accused was convicted were akin or intimately connected with one another, applying the decision of the former Federal Court in*Datuk Haji Harun bin Haji Idris & Ors v Public Prosecutor* [1978] 1 MLJ 240; [1977] 1 LNS 24, such that the sentences ought therefore to be ordered to run concurrently.

[2876]Learned lead senior counsel concluded by asserting that the higher the status of an accused, the more serious the fall he suffers, and that is already his punishment.

Submissions by the prosecution on aggravating factors

[2877]Learned lead prosecutor started by emphasising that the law is above the most powerful, and that this is also a manifestation of art 8 of the Federal Constitution that clearly states that all persons are equal before the law. This is a precedent creating case that should be a strong deterrent against crimes committed by the holder of the high office of Prime Minister in this country.

[2878]It is contended the sentence should reflect that this is the 'worst case imaginable' for the offences, more so since this case has tarnished the image of the country and also that no steps were taken by the accused to return the RM42m which belonged to SRC.

[2879]In respect of the offence under s 23 of the MACC Act, and its precursor, this is the first time a person was charged for acts done when he was the serving Prime Minister, and is undoubtedly without precedent in the sense that previous convictions of high ranking politicians could not be considered to be in the same league as the Prime Minister of the country. Notably, the case of *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1; [1999] 2 CLJ 215 involved a Deputy Prime Minister, whilst the decisions in *Datuk Haji Harun bin Haji Idris & Ors v Public Prosecutor* [1978] 1 MLJ 240; [1977] 1 LNS 24 and *Mohd Khir bin Toyo lwn Pendakwa Raya* [2013] 4 MLJ 801; [2013] 5 CLJ 323 both concerned the Menteri Besar of Selangor, and in *Haji Abdul Ghani bin Ishak & Anor v Public Prosecutor* [1981] 2 MLJ 230; [1981] 1 LNS 96, *Public Prosecutor v Dato' Waad bin Mansor* [2005] 2 MLJ 101; [2005] 1 CLJ 421, *Datuk Sahar bin Arpan v Public Prosecutor* [2007] 1 MLJ 697; [2007] 1 CLJ 326 and *Public Prosecutor v Dato Haji Mohamed Muslim bin Haji Othman* [1983] 1 MLJ 245; [1982] 1 LNS 71 all involved State EXCO Members or Assemblymen.

[2880]Learned lead prosecutor submitted that these authorities made it clear that the sentences for corruption offences should act as a deterrent and that loss of political career is far from being an extenuating circumstance. This court was referred to the following passages in the case of *Public Prosecutor v Dato' Waad bin Mansor* [2005] 2 MLJ 101; [2005] 1 CLJ 421 where the Federal Court stated the following:

> 71. In our opinion, in cases of corruption it is difficult to envisage a situation where public interest does not require the principle of deterrence to predominate. In *Lim Poh Tee v PP* [2001] 1 SLR 674, it was held that the principle of deterrence dictated that the length of the custodial sentence awarded had to be a not insubstantial one in order to drive home the message that such offences would not be tolerated; but not so much as to be unjust in all the circumstances of the case. In this regard, the culpability of the offender, the circumstances of the offence, the aggravating and

mitigating factors, and the sentences imposed in similar cases would be relevant considerations.

72. Reverting to the present appeal before us, it is our view that very little emphasis has been placed by the CA in their judgment on the aforesaid principles of sentencing.

73. The CA had placed much emphasis on the fact that the respondent's political career is destroyed, the positions he once held lost and possibly never to be recovered and his good name tarnished. With respect, these are by no means extenuating circumstances which could attract sympathy. These in fact are considerations that the respondent should have in mind before he embarked upon this nefarious scheme and they certainly should not have an overwhelming effect on the sentencing process as held by the CA.

74. As we have quoted earlier in this judgment, the aim of the Ordinance is to bring to book renegade politicians and public servants who abuse their positions. The effect of any punishment imposed is to deter politicians and public servants from conducting their public affairs in a corrupt manner (see *PP v Dato Haji Mohamed Muslim bin Haji Othman*).

[2881]The prosecution also referred to many other cases including *Public Prosecutor v Datuk Tan Cheng Swee & Anor* [1980] 2 MLJ 276; [1980] 1 LNS 58, *YAM Pg Indera Wijaya Pg Dr Hj Ismail bin Pg Hj Damit v Public Prosecutor* [2011] 5 MLJ 667, *State (by the Superintendent of Police, Vigilance & Anti-Corruption, Special Investigation Cell, Chennai v Selvi J Jayalalitha & 3 Ors* (Spl.C.C208/2004) and *Satyendra Kumar Mehra @ Satendera Kumar Mehra v State of Jharkhand* LNIND 2018 SC 115; [2018] 3 MLJ (Crl) 18 (SC).

[2882]It was highlighted that in *YAM Pg Indera Wijaya Pg Dr Hj Ismail bin Pg Hj Damit v Public Prosecutor* [2011] 5 MLJ 667, the principle that punishment and deterrent should be uppermost in the mind of the sentencing judge is made manifest, where the Court of Appeal in Brunei held instructively as follows:

[110] This court will not interfere with a sentence unless it is shown to be manifestly excessive or wrong in principle. On this basis, it is contended on behalf of the appellant that the starting point was too high. In a case such as this, however, where a course of corrupt conduct by a man in high and powerful public office, involving very large sums of money, is pursued over many years, punishment and deterrence must be the paramount considerations. As was said in *HKSAR v Wong Kwok Wang* [2008] 4 HKLRD 404 at p 414:

> It would seem that once it becomes known that at the heart of a major company in whose gift it is to award massively lucrative contracts, there sits a corrupt officer willing to sell himself in order to exert influence, many contractors are only too ready to avail themselves of the opportunity. Such officers and such contractors must be made aware that they can expect no quarter from the courts if they are caught.

A [111] That was a case of private sector corruption but the principle stated is applicable where the corrupt officer sits at the very head of a Government department. See for example, *R v Foxley* (1995) 16 Cr App R (S) 879 where Roch LJ said:

B > Sentences of former public servants for taking bribes, especially in cases such as the present where the motive was not some urgent financial necessity but personal enrichment, must contain substantial elements of punishment and deterrence. Over £2 million was obtained by this man. If the appellant and his family were subjected to anxiety and stress over many years while these matters were investigated, that was the appellant's doing ...

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[2883]In relation to the offence of CBT in the three charges, the prosecution highlighted a number of cases, which included *Aisyah bt Mohd Rose & Anor v Public Prosecutor* [2016] 1 MLJ 840; [2016] 1 CLJ 529 where the sum involved was RM1.5m which landed a jail term of five years to the accused; *Che Hasan bin Senawi v Public Prosecutor* [2009] 1 MLJ 55; [2008] 5 CLJ 769, *Sim Gek Yong v Public Prosecutor* [1995] 1 SLR 537, *Public Prosecutor v Muthu Lingam* [1986] 1 MLJ 432; [1986] 1 CLJ 78; [1986] CLJ Rep 603, *Mohamed Abdullah Ang Swee Kang v Public Prosecutor* [1988] 1 MLJ 167; [1987] 2 CLJ 405; [1987] CLJ Rep 209; *Wong Kai Chuen Philip v Public Prosecutor* [1991] 1 MLJ 321; [1990] 1 LNS 146 and *Public Prosecutor v Khairuddin* [1982] 1 MLJ 331; [1981] CLJ 86A; [1981] CLJ Rep 234 (CBT of RM20,000 by a credit controller of a bank, sentenced to 18 months of imprisonment and fine of RM2,000).

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[2884]And as for the money laundering charges, the prosecution refers to the Court of Appeal decision in *Azmi bin Osman v Public Prosecutor and another appeal* [2016] 3 MLJ 98; [2015] 9 CLJ 845 where the accused was a Deputy Superintendent of Police in charge of combating vice activities, including illegal gambling but had instead abused his position of trust and obtained illegal gains. He was sentenced to two years imprisonment for each of the four charges of money laundering which were ordered to run consecutively, and was also fined.

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[2885]The prosecution concluded its submissions by reiterating that the instant case is a near worse-case scenario situation and urged the court to mete out a sentence that would incorporate the elements of deterrence and retribution.

I

Mitigation by the accused

[2886]The defence requested that I allow the accused to personally address this court on his mitigation as well. I allowed the request.

[2887]I am not unmindful that there is in fact no express provision on plea of mitigation except for a reference in s 176(2)(r) of the CPC on the notes that the court should keep as record. Indeed, in *Ng Ai Tiong v Public Prosecutor* [2000] 2 SLR 358 the Singapore High Court disagreed that it was the duty of the court to invite the accused to present his plea in mitigation. Yong Pung How CJ observed that it was for the defence to bring to the court's attention all the mitigating circumstances.

[2888]In his mitigation, the accused highlighted his key achievements as the Prime Minister of the country for nine years, focusing in particular on the robust economic growth which for the year 2017 recorded a 5.9% increase, and that it was during his premiership that the stock exchange (Bursa Malaysia) witnessed the longest ever bull run in its history.

[2889]He had also overseen the massive infrastructure development in the country, which included public transport and public housing. He emphasised that his contribution for the betterment of the nation was not merely macro in nature but also included significant financial performance registered by Petronas — with had cash reserves of RM120 billion and with public funds such as Amanah Saham Bumiputera, Lembaga Tabung Haji and Lembaga Tabung Angkatan Tentera achieving dividends at record levels.

[2890]The accused said that he had always wanted to create a gentle society, as exemplified by his government's abolition of the Internal Security Act 1960. His administration had also wanted to enact laws governing political donation but the matter did not get the requisite support to be progressed further.

[2891]The accused ended his mitigation by taking the 'Islamic oath' that he had never demanded the RM42m, never planned for it and that it was also never offered to him. He additionally stated that he had no knowledge of the RM42m.

Evaluation and decision of this court

Importance of public interest considerations

[2892]In my view it is most useful to start any analysis of sentencing by reiterating the important point of public interest, in respect of which it was stated by Hashim Yeop Abdullah Sani J (as he then was) in *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256; [1976] 1 LNS 102 as follows:

> One of the main considerations in the assessment of sentence is of course the question of public interest. On this point I need only quote a passage from the judgment of Hilbery J in *Rex v Kenneth John Ball* as follows:

> In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest.

[2893]The decision of Hilbery J for the English Court of Appeal in *R v Kenneth John Ball* [1951] 35 Cri App R 164 is noteworthy for pronouncing two other sentencing considerations of general importance. The first, also referred to in *Public Prosecutor v Loo Choon Fatt* is the basis for appellate intervention, as follows:

> In the first place, this court does not alter a sentence which is the subject of an appeal merely because the members of the court might have passed a different sentence. The trial Judge has seen the prisoner and heard his history and any witnesses to character he may have chosen to call. It is only when a sentence appears to err in principle that this court will alter it. If a sentence is excessive or inadequate to such an extent as to satisfy this court that when it was passed there was a failure to apply the right principles, then this court will intervene.

[2894]The other, adopted by Chang Min Tat J (as he then was) in the case of *Lim Yoon Fah v Public Prosecutor* [1971] 1 MLJ 37; [1970] 1 LNS 66, is the true meaning of the concept of public interest, which in my view is not always wholly understood, and which in that case explained in the following terms:

> The learned president stressed the public interest in coming to his decision on sentence and was of the opinion that armed robberies should be discouraged by a deterrent sentence. With respect, I would agree. But in this case, it seems to me that in safeguarding the public interest, the learned president had, with all respect, not sufficiently considered the full meaning of that passage from Hilbery J in *R v Ball* 25 Cr App R 164 which he quoted and is now reproduced:
>
> > In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the court to decide what is within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the court has the right and the duty to decide whether to be lenient or severe.

and, in particular the sentence therein which I have emphasised, and applied it to the appellant. A particular criminal may be so induced only by a deterrent sentence of a long term of imprisonment. Another may well profit by being given a second chance. As the Court of Appeal had said in *Ho Kim Luan and Anor v Public Prosecutor* [1959] MLJ 159 at page 162:

> Each case, of necessity, must depend upon its own facts and upon the character and antecedents of the offender.

[2895]No less importantly, at the same time the sentencing court must be mindful of the four key principles and objectives of sentencing — retribution, deterrence, prevention and rehabilitation. Public interest as such should not only reflect the abhorrence of the society against the crime by the imposition of elements of retribution and deterrence in the sentence, but should also ensure the promotion of rehabilitation and reformation on the part of an accused himself.

[2896]It is imperative to appreciate that, as had been made clear in the case of *Public Prosecutor v Khairuddin* [1982] 1 MLJ 331; [1981] CLJ 86A; [1981] CLJ Rep 234, each sentence should reflect the severity of each of the different charges. Mohamed Azmi J (as he was then) held thus:

> Be that as it may, in assessing sentence, the learned President did not seem to make any distinction between the case of CBT by a servant and a case of dishonest misappropriation. He seems to have treated all the four offences as if they were preferred under the same section of the Penal Code; and looking at the sentences imposed, he seems to have considered the offence of CBT by a servant to be of same gravity as that of dishonest misappropriation. In my view, where a person is charged with more than one offence, it is the duty of the court to pass sentences in such a way that each sentence should reflect adequately the seriousness of each particular charge. Whilst the learned President had, it appears, assessed the sentences on the three charges for dishonest misappropriation inter se adequately, he had apparently failed to appreciate that the offence of CBT by a servant is more serious in nature ...

[2897]And Mohamed Azmi SCJ later in *Mohamed Abdullah Ang Swee Kang v Public Prosecutor* [1988] 1 MLJ 167; [1987] 2 CLJ 405; [1987] CLJ Rep 209 ruled for the Supreme Court as follows:

> Although the classical principles applicable to all sentences were summed up in *Reg v Sargeant* (1974) 60 Cr App R 74 as retribution, deterrence, prevention and rehabilitation, in view of the prevalence of criminal breach of trust cases at the present time, we agreed to adopt the argument of Lawton LJ in *Reg v Davies* (1978) 67 Cr App R 207 and accordingly we held that in this particular case only the elements of retribution and deterrence needed to be considered. As such, binding over the accused under s 173A or s 294 of the Criminal Procedure Code (which, in effect, is similar to a suspended prison sentence) or imposing a term of one day's imprisonment with fine would seldom be a suitable sentence to fit the crime of

breach of trust particularly under ss 408 and 409 of the Penal Code. As stated in *Public Prosecutor v Khairuddin* [1982] 1 MLJ 331 at p 332, an authority cited by the learned trial judge:

> The number of people placed in position[s] of trust has been growing steadily and rapidly both in the private and public sectors with corresponding increase in opportunities for such people to make easy money by dishonest means.
>
> ... Public interest demands that cases of this nature involving persons in positions of trust, particularly in financial institutions, must be dealt with severely, in the hope that would-be offenders would be deterred. Until it is understood by such people that the normal punishment for helping themselves to their employers' money is to be sent to prison, there will continue to be officials in commercial and cooperative banks and similar institutions, prepared to pilfer the till.

[2898]In my view, the same principles of deterrence and retribution would be the more important considerations to be taken into account in the sentencing process in this case, considering the position of the accused and the nature of as well as his involvement in the commission of all the offences of abuse of position, criminal breach of trust and the money laundering charges which in turn are predicated on the abuse of position and CBT offences.

[2899]The Federal Court in *Bhandulananda Jayatilake v Public Prosecutor* [1982] 1 MLJ 83; [1981] 1 LNS 139 affirms that the courts are the guardians of the public interest. In the case of *Public Prosecutor v Loo Chang Hock* [1988] 1 MLJ 316; [1988] 1 CLJ 76; [1988] 2 CLJ Rep 263 it was held that the court should more relevantly impose a deterrent sentence under circumstances where the offences were committed with premeditation and planning, and that a deterrent sentence is of little value if it is passed in respect of an offence which is committed on the spur of the moment. All the offences for which the accused in the instant case before me are convicted, abuse of position, CBT and money laundering manifestly involved deliberate planning and premeditation over a period of time.

[2900]This is not to say that the elements of retributive justice is given less consideration. The decision of the Court of Appeal in *Pendakwa Raya v Abdul Halim bin Ishak & Anor* [2013] MLJU 821; [2013] 9 CLJ 559 made it clear in the following terms:

> ... denunciation, in the context of sentencing, is achieved by the imposition of a sentence the severity of which makes a statement that the offence in question is not to be tolerated by society either in general or in a specific instance. The statement made may be directed at any combination of the public at large, victims, potential offenders and individual offenders. In part, its aims are similar to that of deterrence, it has also been seen to be associated with retribution.

[2901]On retribution, I need only refer to the judgment of Wan Yahya J (as he

then was) in *Hari Ram Seghal v Public Prosecutor* [1981] 1 MLJ 165; [1980] 1 LNS 116 who made the following observations which I fully subscribe to:

> The learned deputy public prosecutor had dutifully submitted that this court should order a retrial because we owed a duty to the complainants. With respect, I am unable to share this view. Our courts have a long time since progressed from the 'eye for an eye' and 'tooth for a tooth' type of justice. The avowed aims of punishments are retribution, justice, deterrence, reformation and protection, but it is never intended to act as a vehicle of vengeance. This court does not sit here to hand out to victims of aggression their 'pound of flesh' but generally to protect society by enforcing justice. Justice here does not mean justice to the accuser alone but also to the accused and justice will be better served in the present instance to free a person, who had been unjustifiably deprived of his right to appeal, from the jeopardy of a second trial. Even if the earlier conviction could be proved to have been properly made, the applicant is nevertheless entitled to a humane treatment in view of hardships arising from the delay.
>
> The court must resist the temptation and decline any invitation into playing the romantic role of the avenger and must concentrate itself instead on procuring justice and upholding the rule of law through our recognised machinery of justice. The persons appearing in our courts have the right to expect the best quality of justice and nothing less. Any mistake or flaw in that machinery, which may have the possibility of injustice, must be resolved in their favour.

The sentence must also be proportionate

[2902]And it certainly cannot be denied that the sentence to be meted must be proportionate to both the gravity of the offence and the degree of responsibility of the accused. In the often quoted decision of the Canadian Supreme Court in *R v Ipeelee; R v Ladue* [2012] 4 LRC 71; [2012] SCC 13 it was held by Le Bel J instructively as follows:

> Proportionality is the *sine quo non* of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system ... Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principles serve a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other.

The facts and circumstances of each case must be appreciated

[2903]Thus, when evaluating the appropriate punishment to be passed, including when examining the length of custodial sentence, the court should consider the overall picture, and take into account especially the gravity of the type of offence committed, the facts concerning the commission of the offence

and the involvement of the accused, any mitigating factors, and sentences that have been imposed in the past for similar offences (see the Supreme Court decision in *Mohamed Abdullah Ang Swee Kang v Public Prosecutor* [1988] 1 MLJ 167; [1987] 2 CLJ 405; [1987] CLJ Rep 209).

[2904]Evidence has been established that for the abuse of position offence under s 23 of the MACC Act, the accused deliberately failed to declare his interest in SRC or to withdraw from the two Cabinet meetings which decided to approve the applications by SRC for government guarantees to make possible the RM4 billion financings from KWAP to SRC. It has also been shown that the accused was engaged in a series of actions and conduct outside the usual remit as the Prime Minister and Finance Minister which intervened in the approval processes at KWAP and MOF, without which the financing and the guarantees would not have materialised. The Cabinet approvals meant the release of RM4 billion to SRC which the accused controlled in respect of which RM42m ultimately flowed from SRC into his Accounts 880 and 906.

[2905]As for the CBT charges, the accused, given his overarching control in SRC, in his capacity as a Director under s 402A of the Penal Code who was entrusted with dominion over the property of SRC had, with dishonest intention caused, through the involvement of among others, his mandate holder and principal private secretary, the misappropriation of the RM27m and RM5m in December 2014 and the misappropriation of RM10m in February 2015, all from SRC. The entire RM42m went into the personal accounts of the accused.

[2906]For the three money laundering charges the RM27m, RM5m and the RM10m, being proceeds of unlawful activities being both the predicate offences of abuse of position and CBT was received by the accused in his personal accounts with the knowledge that they were proceeds of unlawful activities or that he was wilfully blind of the same.

[2907]In addition, it hardly needs repeating that the accused had fully utilised on the said RM42m soon after receipt. The recipients of the spending by the accused are many and various but unmistakably for the accused's own purposes and benefits, with RM32m being the repayment to the PPB Group for the advances earlier made to the accused in July and September 2014 which the accused had used for, among others, regularisation of his accounts which included settling his credit card liabilities. Others include for overtly political purposes as even those activities and projects which appeared to be targeted at the less fortunate in the society were channelled through political organisations, which served the accused's political benefit and power given his standing as the President of UMNO and Chairman of BN. And the overriding yet basic point has always been manifest. The RM42m is the property of SRC.

[2908]The use of that property by others can never be justified under any circumstances. This is immutable and cannot be obfuscated by any diversions that the certain portions of the monies out of the RM42m were expended for charitable purposes. There is quite simply no virtue in donating what one does not own. SRC was established to spearhead the promotion of alternative energy resources for the country. The RM4 billion financing from KWAP was intended to enable SRC to do exactly just that. In his testimony, the accused admitted that the bulk of the RM4 billion had been disbursed out of SRC and inexplicably remained frozen in a foreign jurisdiction, and that the RM42m from SRC must have been part of the RM4 billion drawn down into the accounts of SRC.

[2909]The accused did not express any remorse and even maintains his defence of no knowledge of the RM42m from SRC in his mitigation speech. Yet I cannot deny he was the Prime Minister of the country. Nor can one question that the accused had made contributions to the well-being and the betterment of the people of this nation, probably in many different ways, for he was after all the Prime Minister for nine years. Political history will continue to debate whether he has done on balance more good than harm. But this very process would arguably be inimical to the ideals of a clean administration that does not tolerate corruption and abuse of power.

[2910]Whether the moral compass of the nation requires some recalibration is deserving of a separate discourse. What this court seeks to affirm is the sanctity of the rule of law and the supremacy of the Constitution. No one — not even one who was the most powerful political figure and the leader of the country enjoys a cloak of invincibility from the force of the law. Any notion to such effect is the very antithesis to art 8 of the Constitution that enshrines that rule that all persons are equal before the law. The ascension of the accused to the pinnacle of the leadership of the nation and his grip on political power reposed in him by the citizens of this country the position of trust in our system of constitutional democracy. His conviction of all seven charges concerning abuse of position, criminal breach of trust and money laundering constitutes nothing less than an absolute betrayal of that trust. For this reason, I consider that the conviction of the accused for abuse of position under s 23 of the MACC Act as the most serious transgression amongst the three given his position of trust as the nation's Prime Minister and Finance Minister when the offences were committed.

Whether this case is 'worst imaginable'

[2911]The prosecution submits that this case is an example of one which is in a worst case category for all the offences. This means that this case is a suitable one for the maximum penalty prescribed in the legislation to be imposed as the

same is intended only for the worst cases. A consideration of the maximum penalty is in any event essential to the determination of the sentence to be imposed. What is meant by a worst case that warrants the imposition of the maximum penalty is that the manner in which the offences were committed or the conduct of the accused is such as to outrage the feelings of the community.

[2912]An especially useful explanation of this concept is found in the following passages from the judgment of Augustine Paul J (as he then was) in *Public Prosecutor v Tia Ah Leng* [2000] 5 MLJ 401; [2000] 5 CLJ 614:

> ... As to what amounts to a 'worst case' scenario I refer to *R v. Ambler* [1976] Crim LR 266 where it was held that:
>
> > ... it is to be borne in mind that when judges are asking themselves whether they should pass the maximum sentence, they should not use their imagination to conjure up unlikely worst possible kinds of cases. *What they should consider is the worst type of offence which comes before the court and ask themselves whether the particular case they are dealing with comes within the broad band of that type.*
>
> In *R v Tait and Bartley* [1979] 24 ALR 473 the Federal Court of Australia adopted the view of Burt CJ in *Bensegger v R* [1979] WAR 65 where his Lordship said at p 68:
>
> > A maximum sentence prescribed by statute is not reserved for the worst offence of the kind dealt with by it that can be imagined. If such were the case it could never be imposed as the addition of further non-existing but aggravating circumstances would never be beyond the reach of imagination. *The true rule as I understand it is that the maximum sentence should be reserved for the worst type of case falling within the prohibition or 'for the worst cases of the sort'. That expression should be understood to be marking out a range and an offence may be within it notwithstanding the fact that it could have been worse than it was.*
>
> In *Sim Gek Yong v PP* [1995] 1 SLR 537 Yong Pung How CJ in referring to these cases said at p 542:
>
> > The principles espoused above in *R v Tait and Bartley* [1979] 24 ALR 473 and *Bensegger v R* [1979] WAR 65 represent, in my view, the approach which should be adopted by a court towards the issue of maximum sentences. *To restrict the maximum sentence to the 'worst case imaginable' would only invite an endless permutation of hypotheses.* In the appellant's case, for instance, would the 'worst case imaginable' be one in which the customs officers had been injured? Or would it be one in which one of the officers had been killed? Or would it be one in which an innocent bystander has been fatally hit by the appellant's car? The possibilities are limitless and the uncertainty intolerable. All that a court can realistically do — and all that it should do — when deciding whether or not to impose a maximum sentence is to identify a range of conduct which characterises the most serious instances of the offence in question. This would, as the court in *R v Tait and Bartley* [1979] 24 ALR 473 *pointed out, involve consideration both of the nature of the crime and of the circumstances of the criminal. Thus, taking the case of a conspiracy to defraud as an example, the fraud involved could be said to come*

within a band of fraud of the worst kind if it concerned a breach of trust; was in the multi-million dollar range; involved a person in a senior and responsible position; and had an element of public impact: see *AG v Cheung Kai-man Dominic* [1987] HKLR 788. (Emphasis added.)

[2913]I would not hesitate to find that this case can be characterised as one that falls within the range of the worst kind of abuse of position, of CBT and of money laundering because not only of how the crimes were committed, but more importantly also it involved a huge sum of RM42m, had an element of public impact as the RM42m belonged to an MOF Inc company — government funds, and could have originated from the RM4 billion financing from state pension fund (KWAP), and which status of the bulk of RM4 billion is told to be an indeterminate obscurity. And perhaps, most importantly, it involved the person who, at the material time, was in the highest ranking authority in the government.

[2914]The relevant parts of the statutes providing for the penalty for the conviction of the offences are set out hereunder.

[2915]In respect of the offence under s 23 of the MACC Act, s 24(1) provides as follows:

24 Penalty for offences under sections 16, 17, 18, 20, 21, 22 and 23

(1) Any person who commits an offence under sections 16, 17, 20, 21, 22 and 23 *shall on conviction be liable to*:

(a) *imprisonment for a term not exceeding twenty years; and*

(b) *a fine of not less than five times the sum or value of the gratification which is the subject matter of the offence,* where such gratification is capable of being valued or is of a pecuniary nature, or ten thousand ringgit, whichever is the higher.

...

[2916]As for the CBT charges, s 409 itself specifies the punishment, as follows:

409 Criminal breach of trust by public servant or agent

Whoever, being in any manner entrusted with property, or with any dominion over property, in his capacity of a public servant or an agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for a term which shall not be less than two years and not more than twenty years and with whipping, and shall also be liable to fine.

[2917]Section 4(1) of the AMLATFPUAA too makes mention of the punishment in the provision creating the offence, as follows:

4 Offence of money laundering

(1) Any person who:

(a) engages, directly or indirectly, in a transaction that involves proceeds of an unlawful activity or instrumentalities of an offence;

(b) acquires, receives, possesses, disguises, transfers, converts, exchanges, carries, disposes of or uses proceeds of an unlawful activity or instrumentalities of an offence;

...

commits a money laundering offence and *shall on conviction be liable to imprisonment for a term not exceeding fifteen years and shall also be liable to a fine of not less than five times the sum or value of the proceeds* of an unlawful activity or instrumentalities of an offence at the time the offence was committed or five million ringgit, whichever is the higher.

...

Sentencing in accordance with the law

[2918]The phrase 'pass sentence according to law' in s 183 of the CPC means that the sentence imposed must not only be within the ambit of the punishable section but it must also be assessed and passed in accordance with established judicial principles (see *Re Chang Cheng Hoe & Ors* [1966] 1 LNS 155; [1966] 2 MLJ 252).

[2919]It is important to appreciate that the language employed in the sentencing provisions of the relevant legislation defines the powers of the sentencing court. In the instant case, the prescriptive words and phrases in the penal provision of the three offences are not identically drafted. These words refer to the nature and quantum of the sentence which the court has the discretion to impose. There are two aspects that I must highlight, even though these were not raised even by the defence.

[2920]First, the CBT provision contains words 'shall be punished' in respect of imprisonment but employs 'shall be liable' in relation to a fine. This distinction in language bears a significant difference in consequence. Cases have established that it is mandatory in law for the court to impose a sentence of imprisonment where the penalty is preceded by this phrase (see the Federal Court decision in *Public Prosecutor v. Agambaran* (1984, unreported but followed by the High Court in *PP v. Nordin Yusmadi Yusoff* [1996] 2 CLJ 90).

[2921]There is however some divergence in judicial authority whether the words 'shall be punished' effectively do away with the discretionary powers of the court to bind over the accused under ss 173A and 294 of the CPC. The

Supreme Court in *Public Prosecutor v Mohamed Nor & Ors* [1985] 2 MLJ 200b; [1985] 1 LNS 25 takes the position that the formula 'shall be punished with imprisonment' does not remove the discretion to apply s 294 of the CPC. And that if a minimum sentence of imprisonment is featured in the provision, the court is obliged to abide by the same but only if the court decides to pass a jail sentence in the first place.

[2922]In light of amendments such as now found in s 173A(8) which states that s 173A shall not apply if the offender is charged with a serious offence, where s 52B of the Penal Code states that a 'serious offence' denotes an offence punishable with imprisonment for a term of ten years or more (as discussed earlier, in the section on application to defer mitigation), the better view appears to be that the discretion of the court to bind over in cases where the formula is 'shall be punished with imprisonment' is retained unless expressly excluded by clear statutory provision such as in situations stated in s 173A of the CPC.

[2923]For the purposes of the instant case, however, the CBT charges are an example of a serious offence under s 52B of the Penal Code. The discretion to bind over the accused is not available. In any event, as discussed earlier, even in the absence of s 173A(8), binding over is usually unsuitable for cases of serious crimes. On the facts of the instant case, it is without any doubt that the option of binding over is entirely unwarranted.

[2924]In contrast, the words 'shall be liable' do not make the prescribed form of punishment mandatory. Instead, these are construed as merely permissive or directory (see *Public Prosecutor v Mohd Salim Hamiddulrahman* [1998] MLJU 254; [1998] 4 CLJ 199). The analysis on the applicability of the exercise of judicial discretion to bind over would also similarly apply here.

[2925]As such, for the three CBT charges, the imposition of the penalty of imprisonment (of not less than two years and not more than 20 years) is mandatory but that of fine is not. The punishment of whipping does not apply because s 289 prohibits this sentence for an accused whose age is more than 50 years. The offences of abuse of position and money laundering, however, as shown above, use the formula 'shall be liable' throughout. Thus, the penalties of imprisonment and fine mentioned therein are not mandatory. However, if the court decides to impose the jail term or fine, any minimum and maximum term and quantum stated in the penal provision must be followed.

[2926]The second aspect relates to the word 'and' which connects the two penalties of imprisonment and fine in each of the offences. On CBT, s 409 is clear in separating the two by subjecting the jail term to the mandatory 'shall be punished' and the fine to the directory 'shall be liable', as stated earlier.

[2927]The penalty section for the abuse of position offence in s 24 of the MACC Act and that for s 4 of the AMLATFPUAA, however, are differently drafted. This raises the question whether the penalties may be meted out alternatively or cumulatively. In s 24 of the MACC Act, the conjunction 'and' which links the two penalties of jail term and fine is preceded by a single expression of 'shall be liable', whereas in s 4 of the AMLATFPUAA each of the two penalties is separately preceded by 'shall be liable' respectively.

[2928]In my view, the effects of the latter situation is clear. The court has the discretion under s 4 of the AMLATFPUAA whether to impose a jail term and has the same discretion whether to impose a fine. As such, for the money laundering offences, the imposition of either imprisonment or a fine is not only directory because of the expression 'shall be liable' but may also be disjunctively or alternatively invoked despite the conjunction 'and' since each of the penalties is preceded by the formula 'shall be liable'.

[2929]However, for the former situation, the position is not free from ambiguity. There are cases which held that the presence of the single formula 'shall be liable' like appearing in s 24 of the MACC Act which precedes the two penalties which are linked by the conjunction 'and' gives the court a complete judicial discretion to determine the appropriate sentence, and may impose the two types of penalties alternatively or conjunctively, just like in s 4 of the AMLATFPUAA. The court may even invoke s 294 of the CPC on binding over (see *Leong Kok Huat v Public Prosecutor* [1998] 6 MLJ 406; [1998] 4 CLJ 106).

[2930]However, a different ruling prevails in the case of *Public Prosecutor v Mohd Salim Hamiddulrahman* [1998] MLJU 254; [1998] 4 CLJ 199 where the High Court had to consider an application by the sessions court for revision of sentence. The accused who pleaded guilty to an offence under s 11(b) of the Anti-Corruption Act 1997 and to an offence under s 6(3) of the Immigration Act 1959/1963 was sentenced to eight months' and six months' imprisonment respectively by the trial court.

[2931]However, with regard to the fine specified in s 16(b) of the Anti-Corruption Act 1997, the trial court did not impose the fine, and held the view that the word 'liable' preceding paras (a) and (b) of s 16 (just like for s 24 of the MACC Act presently before me) gave the court an absolute discretion both as to the form and extent of the sentence, and that therefore the word 'and' between s 16(a) and (b) should be read disjunctively — in other words construing the word 'and' as 'or'.

[2932]Similar to the formula in s 24 of the MACC Act, s 16 of the now repealed Anti-Corruption Act 1997 reads as follows:

16 Penalty for offences under sections 10, 11, 13, 14 and 15

Any person who is found guilty of an offence under section 10, 11, 13, 14 or 15 shall on conviction be liable to:

(a) imprisonment for a term of not less than fourteen days and not more than twenty years; and

(b) a fine of not less than five times the sum or value of the gratification which is the subject matter of the offence where such gratification is capable of being valued or is of a pecuniary nature, or ten thousand ringgit, whichever is the higher.

[2933]The following passages from the judgment of Jeffery Tan J (as he then was) are especially instructive:

The ordinary meaning of the word 'and' is perhaps best conveyed by the words 'together with'. It is a conjunction connecting words or phrases expressing the idea that the latter is to be added to or taken along with the first ... It expresses a general relation or connection, a participation or accompaniment in sequence, having no inherent meaning standing alone but deriving force from what comes before and what comes after. In its conjunctive sense, the word is used to conjoin words, clauses, or sentences, expressing the relation of addition or connection, and signifying that something is to follow in addition to that which precedes ... (*Black's Law Dictionary* 6th Ed p 86).

...

Accordingly, it was incumbent upon the trial court to interpret literally, by giving s 16 its ordinary, plain and natural meaning, which is 'that any person convicted ... shall be liable to imprisonment ... and a fine ...' That is not to say though that the prescribed form of punishment under s 16, because the words 'shall be liable to' have been construed as permissive, is mandatory. After all, in an appropriate case, a court is entitled to act under s 294 of the Criminal Procedure Code. That power has not been taken away. *But if a court should act under s 16, then it cannot deny the effect of s 16 but must impose the prescribed imprisonment under sub-s 16(a) and the prescribed fine under sub-s 16(b). That is the only possible construction.*

[2934]For present purposes, I would be inclined to follow this authority in *Public Prosecutor v Mohd Salim Hamiddulrahman* because it dealt with a similar penal provision as found in s 24 of the MACC.

[2935]Accordingly, in my view, for the conviction for the charge of abuse of position under s 23 of the MACC Act, first, s 24 is to be construed as being directory because of the expression 'shall be liable' which precedes the penalties of both jail term and fine. This court may strictly exercise its discretion to decide whether or not to impose the penalties stated therein. Secondly, if this court decides to impose any of the penalties, the terms and quantum as specified in the penal provision of s 24 must be followed. Thirdly, as made clear

in *Public Prosecutor v Mohd Salim Hamiddulrahman*, because of the conjunction 'and' connecting the two penalties, and since they are preceded by a single expression 'shall be liable', if this court decides to pass a jail sentence, it must also impose a fine, in accordance with the quantum formula in the provision.

[2936]In the final analysis, a sentencing court bears the duty to ensure that the sentence commensurate with the seriousness of the criminal wrongdoing and reflect the degree of public disapproval vis a vis the offence in question. Public interest must indeed take precedence over other considerations, and in that regard, the gravity of the offence as demonstrated by the facts of the case must be placed in its proper context and perspective. Mitigating factors in favour of the accused person are especially pertinent too, if not strong considerations. Each case must be evaluated on its own peculiar facts and circumstances. In this case, I have also taken into account the mitigation done by both the defence and by the accused personally. His antecedents, including that he is a first offender and had cooperated with the authorities during investigations, and especially his many contributions to the country in his long years in the government are particularly significant. However, the accused did not express any remorse and in fact continued to deny he had knowledge of the RM42m in his mitigation speech.

[2937]Having considered all relevant considerations, especially recognising that each of these seven charges of serious offences reflects a scenario of a near worst imaginable case given the premeditation and sophistication in the manner these offences were committed, the loss of public funds of RM42m belonging to SRC which was instead used for the accused's own benefit and advantage, and most critically, the fact that these grave offences were committed by the accused when he held the ultimate position of public trust as the Prime Minister of the nation. I therefore decide that a jail term is an appropriate sentence for each of the seven charges. The imposition of a jail sentence under s 24 also obliges me to pass a sentence on fine, as discussed earlier. Given the very large amount of fine of at least RM210m that I must impose on the accused, I consider that the option to fine the accused under s 409 of the Penal Code for the CBT charges and under s 4 of the AMLATFPUAA to be unnecessary.

[2938]It cannot be emphasised enough that although it has been said that judicial precedent plays little role in sentencing in the absence of the background and antecedents of the accused as well as the facts of the case, the recent and present trend of sentencing of the offence in question is invariably always pertinent. However, there is no clear precedent for this case given the sum involved and the position of the accused. The cases highlighted by the prosecution concerning crime committed by those in a powerful position of

authority and as members of the administration each shows a jail term of not more than five years. Thus, the following cases should be noted:

(a) *Datuk Haji Harun bin Haji Idris & Ors v Public Prosecutor* [1978] 1 MLJ 240; [1977] 1 LNS 24, where the accused, the former Menteri Besar, received the sentence of four years' jail for forgery and three years' jail for CBT;

(b) *Mohd Khir bin Toyo lwn Pendakwa Raya* [2013] 4 MLJ 801; [2013] 5 CLJ 323, another former Menteri Besar of the same state, where the accused was sentenced to one year imprisonment for a conviction under s 165 of the Penal Code;

(c) *Haji Abdul Ghani bin Ishak & Anor v Public Prosecutor* [1981] 2 MLJ 230, where the accused, a State EXCO, was sentenced to one year imprisonment for a conviction under s 2(1) of the Emergency (Essential Powers) Ordinance No 22 of 1970;

(d) *Public Prosecutor v Dato' Waad bin Mansor* [2005] 2 MLJ 101; [2005] 1 CLJ 421, where the state assemblyman was sentenced to two years' jail for each of the three charges under s 2(1) of the Emergency (Essential Powers) Ordinance No 22 of 1970, which ran concurrently;

(e) *Datuk Sahar bin Arpan v Public Prosecutor* [2007] 1 MLJ 697; [2007] 1 CLJ 326, two years' concurrent imprisonment for each of the three charges under s 2(1) of the Emergency (Essential Powers) Ordinance No 22 of 1970 for using public position as an EXCO member for pecuniary advantage, and fine of RM20,000;

(f) *Public Prosecutor v Dato Haji Mohamed Muslim bin Haji Othman* [1983] 1 MLJ 245; [1982] 1 LNS 71, where the conviction of the EXCO member for the same offence s 2(1) of the Emergency (Essential Powers) Ordinance No 22 of 1970 resulted in a jail term of one day and fine of RM2,000; and

(g) *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1; [1999] 2 CLJ 215, where the accused, a former Deputy Prime Minister was sentenced to six years' imprisonment in respect of each of the four charges under s 2(1) of the Emergency (Essential Powers) Ordinance No 22 of 1970, which ran concurrently.

[2939]There is little merit in this court pontificating and lamenting on why the accused had done what he did, despite (or because of) his undisputed standing at the apex of the vast wealth of power and unparalleled authority. The accused, I repeat, is a person with a keen intellect and must surely have a firm sense of right and wrong. I need only, in concluding to emphasise three points. First, the accused has been convicted of seven serious criminal charges which he had committed when he was the Prime Minister of the country, thus betraying

the public trust of this august office. Secondly, he must as a consequence be punished in accordance with the law. Thirdly, it now falls upon me to fulfil my judicial oath to preserve, protect and defend the Constitution in sentencing the accused by ensuring that the provision of art 8 of the Constitution that all persons are equal before the law is upheld.

[2940]Having evaluated the myriad of considerations as set out above, including the near worst case imaginable scenario for each of the charges, the facts and circumstances of the case, his mitigation, the differences in the applicable penal provisions in the Penal Code, the MACC Act and the AMLATFPUAA, and having referred to a number of other relevant cases and in seeking to achieve a sentence that as closely as possible reflect the key sentencing objectives of especially deterrence and retribution (see *Public Prosecutor v Teh Ah Cheng* [1976] 2 MLJ 186; [1976] 1 LNS 116), in my judgment, in attempting to strike a balanced determination of the most proportionate, fair and appropriate punishment for the accused for his conviction for the seven charges are as follows:

(a) for the single charge under s 23 of the MACC Act for abuse of position for gratification — imprisonment for 12 years and a fine of RM210m (in default five years' jail);

(b) for each of the three charges under s 409 of the Penal Code for criminal breach of trust — imprisonment for ten years; and

(c) for each of the three money laundering charges under s 4 of the AMLATFPUAA — imprisonment for ten years.

[2941]I also consider the seven charges to be intimately connected with each other (see the Federal Court decision in *Datuk Haji Harun bin Haji Idris & Ors v Public Prosecutor* [1978] 1 MLJ 240; [1977] 1 LNS 24) especially given the fact that each of the three offences of abuse of position, CBT and money laundering committed by the accused refer to the same RM42m from SRC. I therefore order the custodial sentences for all the charges to run concurrently. This is also consistent with s 282(d) of the CPC which states that every sentence of imprisonment shall take effect from the date on which it was passed unless the court otherwise directs. I also consider the concurrent sentence to be consistent with the totality principle (see *Public Prosecutor v Teo Heng Chye* [1989] 3 MLJ 205; [1990] 1 CLJ 194; [1990] 3 CLJ Rep 904) and that a cumulative or consecutive sentence in this case may offend the principle against the imposition of a 'crushing sentence' (see *Wong Kai Chuen Philip v Public Prosecutor* [1991] 1 MLJ 321; [1990] 1 LNS 146).

STAY OF EXECUTION

Application for stay of execution

[2942]Upon the conviction of the accused on the seven charges, the defence informed the court that the accused would be appealing against the conviction. The accused would also be appealing against the sentence. Under s 311 of the CPC, as discussed earlier, and s 57 of the Courts of Judicature Act 1964, no appeal shall operate as a stay of execution, but the court may exercise its discretion to grant a stay of execution in accordance with well-established judicial principles and be based on the facts and circumstances of each individual case. The grant of a stay is only an exception to the general rule; hence, special or exceptional circumstances must be shown to exist before the discretion can be exercised in favour of a convicted applicant.

Stay of imprisonment

[2943]I need only refer to two leading authorities on this subject. The first is the case of *KWK (A Child) v Public Prosecutor* [2003] 4 MLJ 479; [2003] 4 CLJ 51 where Augustine Paul JCA (as he then was) set out the following factors:

> The factors that may constitute special circumstances to justify the grant of a stay of execution after conviction are well settled (see, for example, *Re Kwan Wah Yip & Anor* [1954] MLJ 146; [1954] 1 LNS 78; *Ganesan v Public Prosecutor* [1983] 2 MLJ 369; [1983] 1 CLJ 300; [1983] CLJ (Rep) 567; *Yusof Mohamed v Public Prosecutor* [1995] 3 MLJ 66; [1995] 1 LNS 291; *Ralph v Public Prosecutor* [1972] 1 MLJ 242; [1972] 1 LNS 118). They can be enumerated as follows:
>
> (a) the gravity or otherwise of the offence;
>
> (b) the length of the term of imprisonment; in comparison with the length of time which is likely to take for the appeal to be heard;
>
> (c) whether there are difficult points of law involved;
>
> (d) whether the accused is a first offender or has previous convictions;
>
> (e) whether the accused would become involved again in another offence whilst at liberty;
>
> (f) whether the security imposed will ensure the attendance of the appellant before the Appellate Court.
>
> This list is not exhaustive (see *Goh Beow Yam v R* [1956] MLJ 251) ... We pause to add that no single factor enumerated earlier can have a determinative effect on the decision to be made. It is the cumulative effect of all the factors that matters ...

[2944]The other is another Court of Appeal decision in *Dato' Seri Anwar Ibrahim v Public Prosecutor* [2004] 1 MLJ 497; [2004] 1 CLJ 592 where Pajan Singh Gill FCJ stated the following:

Accordingly based on the foregoing cases the principles of law expounded as guidelines in the exercise of discretion when considering an application for bail pending appeal may be briefly summarised thus:

(a) that the presumption of innocence is no longer a factor to consider;

(b) that the factors to consider differ from that of pre-conviction application for bail;

(c) that attendance in court is only a minor consideration;

(d) that the time lapse before the appeal can be determined in relation to the length of sentence imposed is a relevant factor. But there is no general rule to say that an applicant with short custodial sentence should be automatically given bail. In appropriate cases bail may be refused even if it means that the sentence will be served before the appeal is heard;

(e) that it is crucial for an applicant to show the presence of exceptional circumstances which would drive the court to conclude that justice can only be done if bail is granted;

(f) that where reliance is placed on proposed grounds of appeal, they must be prima facie very strong or extraordinarily high prospect of success;

(g) that public confidence in the administration of justice requires that judgment should be enforced, hence a person convicted of a serious offence, particularly a repeated offender, should be denied bail;

(h) that an appellate court should not be put in an awkward situation of having to return a convict upon dismissal of his appeal to prison to serve his sentence when his circumstances might have drastically changed while he is out on bail. Or he might have created a situation whereby it will be difficult to return him to prison upon dismissal of his appeal and thus frustrate justice; and

(i) that by making bail readily available after conviction it will encourage the proliferation of unmeritorious appeals.

[2945]In view of the foregoing principles, I find that the accused and the facts of the instant case have successfully established the presence of special circumstances, for the following reasons. First, I accept that there are novel points of law involved. I would not say they are difficult, but they have probably never been judicially considered before. The defence submitted on a long list of such issues, a few of which I accept are quite new. These include, to name only two, the accused being found to be a director under s 402A of the Penal Code for the CBT charges and definition of interest under s 23(2) of the MACC Act. The accused is also a first offender and has no previous convictions. It appears unlikely that the accused would become involved again in another offence whilst at liberty as he is also presently answering criminal charges in two High Courts. Further in *Ganesan v Public Prosecutor* [1983] 2 MLJ 369; [1983] 1 CLJ 300; [1983] CLJ Rep 567 Mohamed Dzaiddin J

(later CJ) approvingly referred to *Mallal's Criminal Procedure* 4th Ed, p 461, which stated as follows:

> Bail should not be refused on the ground that the accused have been sentenced to a long term of imprisonment or that the granting of bail has a tendency to increase the number of appeals and of protracting the appellate proceedings. The discretion vested in the Court to grant bail should be judiciously exercised in accordance with the principles laid down by the Statutes on the facts of each particular case.

[2946]In addition, courts should also ensure in evaluating the cases before them that art 8 of the Federal Constitution on the principle that everyone is equal before the law is applied strictly. This also must mean the accused should not have basis to feel that he is unfairly treated when compared to others in respect of stay applications.

Sentence of fine

[2947]The accused also asked for the sentence of fine to be stayed. In the first place, as I have mentioned earlier, the principles enunciated in cases such as *KWK (A Child) v Public Prosecutor* [2003] 4 MLJ 479; [2003] 4 CLJ 51 and *Dato' Seri Anwar Ibrahim v Public Prosecutor* [2004] 1 MLJ 497; [2004] 1 CLJ 592 governing the grant of stay of execution seem to apply more to the sentence of imprisonment. Not to the sentence of fine.

[2948]It is to be observed that s 283(1)(b)(i) of the CPC provides that where no time limit has been allowed for payment of fine, imprisonment in default is only to be carried out if it appears to the court that the accused has no property or insufficient property to settle the fine payable or that the levy of distress will be more injurious to him or his family than imprisonment. Further, the High Court in *Mohd Noor bin Yunus & Ors v Public Prosecutor* [2000] 5 MLJ 197; [2000] 5 CLJ 168 clarifies the structure of s 283(1)(b) of the CPC in that if the accused is unable to pay a fine, he must be brought back to the court and alternatives must first be considered before he is sent to prison in the first instance for default of fine. Thus, without an application being made or being informed that the accused is not in a position to pay the fine, the court cannot give time for payment, and when a fine is not paid when no time for payment has been applied for, the accused is assumed to be capable of making payment but chooses not to pay. In such event, he must be sent to prison for the default.

[2949]In *Mohd Noor bin Yunus & Ors v Public Prosecutor*, the High Court granted the stay of the sentence of fine because the trial court had ordered the accused to serve imprisonment in default of payment of fine without considering the alternatives under s 283(1)(b)(iv) of the CPC of permitting the accused time to pay the fine or allowing payments by instalments. Given the exceptional circumstances of the case and since the sentence of imprisonment

had been stayed, the High Court allowed a stay of the sentence of fine and instead remitted the case back to the trial court to avoid a further detention of the accused.

[2950]The imposition of a fine beyond the accused's means or a term of imprisonment in default of payment is tantamount to sentencing the accused to imprisonment without the option of a fine (see *Tan Kah Eng v Public Prosecutor* [1965] 2 MLJ 272; [1965] 1 LNS 179. After all, it is an established principle that a fine should always relate to the means of an accused. Furthermore, s 311 of the CPC as referred to earlier is widely drafted to permit the court to order a stay of the sentence of fine. This is also supported by the decision of the High Court in *Teo Soon Kiat & Anor v Public Prosecutor* [2018] 12 MLJ 524; [2018] 2 CLJ 781.

[2951]Now, in the instant case, however, given my decision to impose a fine, as I have explained earlier, I am obliged to follow the quantum and term of the fine as enacted in s 24 of the MACC Act. This translates to the minimum of RM210m which is the exact amount of fine imposed by this court on the accused.

[2952]I accept that in practice a stay is not usually given for the sentence of fine for the reason that a fine already paid can be refunded should the sentence be set aside, as opposed to the loss of liberty which is irreversible. But this position is true only if the accused is genuinely able to pay the fine. Otherwise, this fine is for all intents and purposes an indirect manner of sentencing the accused to a jail term, especially when a default provision is imposed.

[2953]Also in this case, when submitting on the sentence, neither the prosecution nor the defence made any proposals under s 283(1)(b) on allowing time for payment of fine or that it be allowed be settled by instalments. Instead, it was the defence who asked for clarification what the default sentence would be for the sentence of the fine. The plain fact is the fine imposed is a very large sum. I had, on my own, considered invoking the provisions of allowing time for payment and of settling for an instalment structure under s 283 but found it unworkable because of the sheer size of the fine.

[2954]This then harkens back to the core principle of the sentence of fine. A court should not impose a fine which it knows or ought to have known that the accused is not in a financial position to pay (see *Chin Loke v Public Prosecutor* [1967] 2 MLJ 132; [1967] 1 LNS 26). In the instant case, this court, minded to impose the sentence of imprisonment under s 24 of the MACC Act, is bound by the penal provision of s 24 of the MACC Act to also pass a sentence of fine, and in accordance with the formula specified therein of which in this case, an extremely large sum of RM210m is the minimum. At the same time as

submitted by the defence, another High Court (Civil Division) has also recently ordered the accused to pay RM1.69 billion in additional taxes and penalties.

[2955]These, in my view, constitute extenuating and special circumstances justifying a stay of execution of the sentence of fine in this case.

[2956]I therefore allow the application of the accused for a stay of the execution of the sentences of imprisonment and fine.

Order accordingly.

Reported by Ashok Kumar